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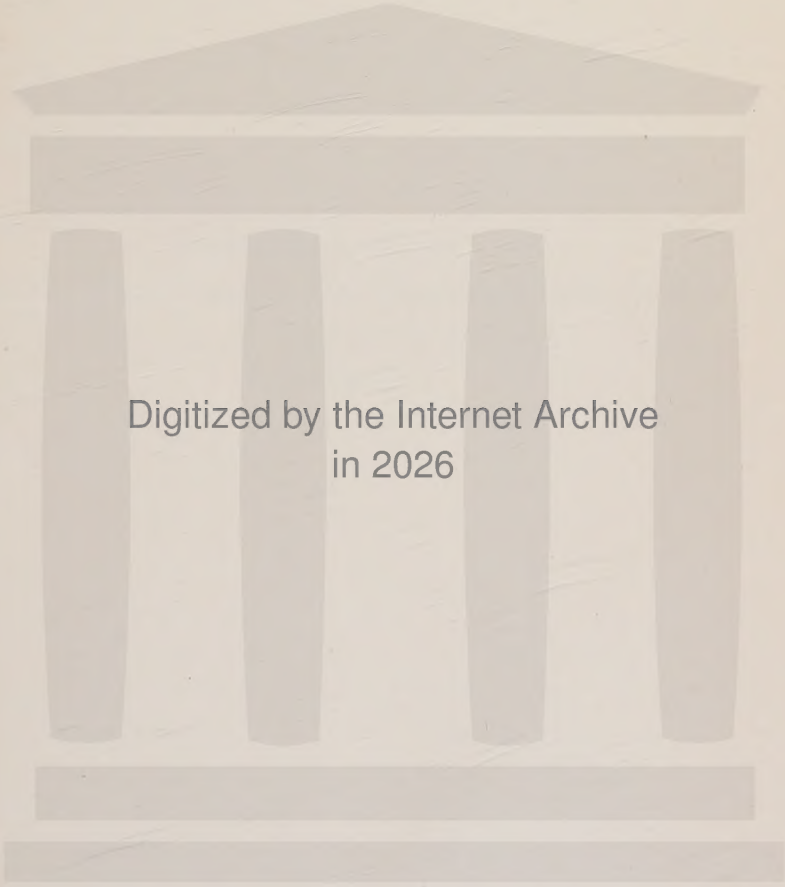
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Division of International Law
Washington

PRIZE CASES

DECIDED IN THE

UNITED STATES SUPREME COURT

1789—1918

Including also cases on the instance side in which questions of Prize Law were involved

PREPARED IN THE DIVISION OF INTERNATIONAL LAW
OF THE CARNEGIE ENDOWMENT FOR INTERNATIONAL PEACE

UNDER THE SUPERVISION OF

JAMES BROWN SCOTT

DIRECTOR

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PRIZE CASES DECIDED IN THE UNITED STATES SUPREME COURT, 1789–1918

The Brig Amy Warwick ; The Schooner Crenshaw ; The Barque Hiawatha ; The Schooner Brilliante.

(2 Black, 635) 1862.

1. Neutrals may question the existence of a blockade, and challenge the legal authority of the party which has undertaken to establish it.
2. One belligerent, engaged in actual war, has a right to blockade the ports of the other, and neutrals are bound to respect that right.
3. To justify the exercise of this right, and legalize the capture of a neutral vessel for violating it, a state of actual war must exist, and the neutral must have knowledge or notice that it is the intention of one belligerent to blockade the ports of the other.
4. To create this and other belligerent rights, as against neutrals, it is not necessary that the party claiming them should be at war with a separate and independent power : the parties to a civil war are in the same predicament as two nations who engage in a contest and have recourse to arms. p. 636
5. A state of actual war may exist without any formal declaration of it by either party ; and this is true of both a civil and a foreign war.
6. A civil war exists, and may be prosecuted on the same footing as if those opposing the Government were foreign invaders, whenever the regular course of justice is interrupted by revolt, rebellion, or insurrection, so that the Courts cannot be kept open.
7. The present civil war between the United States and the so-called Confederate States, has such character and magnitude as to give the United States the same rights and powers which they might exercise in the case of a national or foreign war ; and they have, therefore, the right *jure bello* to institute a blockade of any ports in possession of the rebellious States.
8. The proclamation of blockade by the President is of itself conclusive evidence that a state of war existed, which demanded and authorized recourse to such a measure.
9. All persons residing within the territory occupied by the hostile party in this contest, are liable to be treated as enemies, though not foreigners.
10. It is a settled rule, that a vessel in a blockaded port is presumed to have notice of a blockade as soon as it commences.
11. The proclamation of blockade having allowed fifteen days for neutrals to leave, a vessel which overstays the time is liable to capture although she was prevented by accident from getting out sooner.
12. To make a capture lawful, it is not necessary that a warning of the blockade should have been previously endorsed on the register of the captured vessel.

THESE were cases in which the vessels named, together with their cargoes, were severally captured and brought in as prizes by public ships

p. 637 of the United States. The libels were filed by the | proper District Attorneys, on behalf of the United States and on behalf of the officers and crews of the ships, by which the captures were respectively made. In each case the District Court pronounced a decree of condemnation, from which the claimants took an appeal.

The *Amy Warwick* was a merchant vessel, and belonged to Richmond. Her registered owners were David and William Currie, Abraham Warwick and George W. Allen, who resided at that place. Previous to her capture she had made a voyage from New York to Richmond, and thence to Rio de Janeiro, Brazil. At the last named port she shipped a cargo of coffee, 5,100 bags, to be delivered at New York, Philadelphia, Baltimore or Richmond, according to the orders which the master would receive at Hampton Roads. She was on her voyage from Rio to Hampton Roads and off Cape Henry when she was captured (July 10th, 1861) by the Quaker City. At the time of the capture the barque was sailing under American colors, and her commander was ignorant of the war. The Quaker City carried her into Boston, where she was libelled as enemy's property. The claimants of the vessel were the persons already named as owners. James Dunlap, Robert Edmonds, John L. Phipps, and Charles Brown claimed the cargo. The claimants in their several answers denied any hostility on their part to the Government or Laws of the United States, averred that the master was ignorant of any blockade, embargo or other interdiction of commerce with the ports of Virginia, and asserted generally that the capture was unlawful.

The *Crenshaw* was captured by the United States Steamer *Star*, at the mouth of James River, on the 17th of May, 1861. She was bound for Liverpool with a cargo of tobacco from Richmond, and was owned by David and William Currie, who admitted the existence of an insurrection in Virginia against the Laws and Government of the United States, but averred that they were innocent of it. The claimants of the cargo made similar answers, and all the claimants asserted that they had no such notice of the blockade as rendered the vessel or cargo liable to seizure
p. 638 for leaving the port of Richmond at the time | when the voyage was commenced. She was condemned as prize on the ground that she had broken, or was attempting to break, the blockade at the time of her capture.

The *Hiawatha* was a British barque, and was on her voyage from Richmond to Liverpool with a cargo of tobacco. She left Richmond on the 17th of May, 1861, and was captured in Hampton Roads on the 20th by the Minnesota, and taken to New York. Her owners were Miller, Massman & Co., of Liverpool, who denied her liability to capture and condemnation on the ground that no sufficient notice had been given of the blockade. The claimants of the cargo put their right to restoration upon a similar basis.

The *Brilliante* was a Mexican schooner, owned by Rafael Preciat and Julian Gual, residents of Campeche. She had on board a cargo of flour, part of which was owned by the owners of the vessel, and part by the Señores Ybana & Donde, who were also Mexican citizens. She had a regular clearance at Campeche for New Orleans, and had made the voyage between those ports. At New Orleans she took in her cargo of flour, part to be delivered at Sisal and part at Campeche, and took a clearance for both those places. On her homeward voyage she anchored in Biloxi Bay, intending to communicate with some vessel of the blockading fleet and get a permit to go to sea, and while so at anchor she was taken by two boats sent off from the Massachusetts. She was carried into Key West, where the legal proceedings against her were prosecuted in the District Court of the United States for the District of Florida.

The minuter circumstances of each case, and the points of fact, as well as law, on which all the cases turned, in this Court and in the Court below, are set forth with such precision in the opinions of both Mr. Justice Grier and Mr. Justice Nelson, that more than the brief narrative above given does not seem to be necessary.

The case of the *Amy Warwick* was argued by *Mr. Dana*, of Massachusetts, for Libellants, and by *Mr. Bangs*, of Massachusetts, for Claimants. |

The *Crenshaw*, by *Mr. Eames*, of Washington City, for Libellants, and p. 639
by *Messrs. Lord, Edwards*, and *Donohue*, of New York, for Claimants.

The *Hiawatha*, by *Mr. Evarts* and *Mr. Sedgwick*, of New York, for Libellants, and by *Mr. Edwards*, of New York, for Claimants.

The *Brilliante*, by *Mr. Eames*, of Washington City, for Libellants, and by *Mr. Carlisle*, of Washington City, for Claimants.

One argument on each side is all that can be given. Those of Mr. Dana and Mr. Carlisle have been selected, not for any reason which implies that the Reporter has presumed to pronounce judgment upon their merits as compared with those of the other distinguished counsel, but because they came to his hands in a form which relieved him of the labor which the others would have cost to re-write and condense them.

Mr. Carlisle. The Brilliante is a regularly registered Mexican ship. Her principal owner, although a Mexican citizen by birth, had been naturalized in the United States. He was, before and at the time of the seizure, the United States Consul at the port of Campeche, a port on the coast of Mexico. The vessel was seized by the United States ship Massachusetts, in Biloxi Bay, north of Ship Island, between *Pas Crétien* and Pascagoula Bay, on the 23rd of June, 1861.

She had sailed from New Orleans, with a cargo of six hundred barrels of flour, put on board there about the 16th of that month, four hundred barrels for the house of the claimant, (American Consul at Campeche,) and the residue for the Mexican house of Ybana & Donde, at Sisal, also

a port on the coast of Mexico; to which houses it was respectively consigned, they being owners of the same, in these proportions.

I. There was no actual breach. The question is of intent.

At the time of the seizure, the Brilliante was lying at anchor in Biloxi Bay, and had so lain at anchor twenty-four hours or more. 'She came
p. 640 out from New Orleans and anchored in | Biloxi Bay, so as to be able to communicate with one of the blockading vessels, but did not see any vessel of war. On the next day, on which the vessel was seized, the sea was too rough to go on board the Massachusetts, which was lying in sight.'

Mr. Preciat, the claimant, 'wished to go on board one of the blockading vessels, to see if he could get a permit to go out to sea; otherwise he intended to have returned with the vessel to New Orleans.' (Deposition of the said Preciat, taken *in preparatorio*, Record, p. 11.) He was returning to Campeche, 'to attend to the duties of his office (*U. S. Consul*,) and business generally.' On going to New Orleans, he had a letter from the Commander of the Brooklyn, one of the blockading squadron, to the Commander of the Niagara, another of them, forwarding him to Mobile, where his son was at school, and whom he desired to take home. The passengers and crew mutinied, and refused to go to Mobile. The mate, taking control, steered for New Orleans, where the vessel arrived, and the crew were discharged. These facts appear from the declarations *in preparatorio*. The libel and decree are exclusively founded on the alleged attempt to leave New Orleans. The claimant had a right to expect that his application to return, although sailing from New Orleans, would have been granted; or, if not granted, that he would have been allowed the option of going back to New Orleans; which he declares, on his examination, was his intention, if not permitted to return to Campeche. He swears that he had no intention to violate the blockade. There is nothing to contradict him, but everything corroborates his declaration. He was at anchor twenty-four hours, and a considerable portion of that time in sight of one of the blockading vessels, which the evidence shows he could not safely attempt to reach in consequence of the state of the weather. Before that period there is nothing to show that he might not have run the blockade safely; nor is there any reason suggested or supposable why he cast anchor, except that he had no intent to violate the blockade. His public character as United States Consul, and the facts before referred to, go in confirmation of this.

p. 641 But chiefly, the terms of the President's proclamation instituting | this so-called blockade, are important to be considered upon this question of intent. The condition of things was unprecedented. From the nature and structure of our peculiar system of government, it *could have had* no precedent. The co-existence of Federal and State sovereignties, and the double allegiance of the people of the States, which no statesman or

lawyer has doubted till now, and which this Court has repeatedly recognized as lying at the foundation of some of its most important decisions; the delegation of special and limited powers to the Federal Government, with the express reservation of all other powers ' to the States and the people thereof ' who created the Union and established the Constitution ; the powers proposed to be granted and which were refused, and the general course of the debates on the constitution ; all concurred in presenting this to the President as a case of the first impression. Assuming the power to close the ports of the seceded States, he evidently did so with doubt and hesitation. If the power be conceded to him, it cannot be denied that he might modify the strict law of blockade, and impose a qualified interruption of commerce. He might well have doubted whether, under the Constitution which he had sworn to support, a state of *war* could exist between a State or States, and the Federal Union ; whether, when it ceased to be insurrection, and became the formal and deliberate act of State sovereignty, his executive powers extended to such an exigency. Certainly, the words of the Acts of Congress authorizing him to use the navy did not embrace such a case. It was not quite certain that it had assumed this imposing shape. The President, so late as his message of July, was confident that it had not. He believed that the State sovereignties had been usurped by discontented leaders and a factious and inconsiderable minority. With the information laid before him, he declared that these seceded States were full of people devoted to the Union. Well, therefore, might he hesitate to exercise, even if he supposed himself to possess, the power of declaring or ' recognizing ' a state of *war*. His powers in cases of insurrection or invasion were clear and undoubted. He had the army, the navy, and the militia of | the States p. 642
(the United States having no militia except in the federal territories) confided to his command, *sub modo*.

But insurrection is not war ; and invasion is not war. The Constitution expressly distinguishes them, and treats them as wholly different subjects. But this belongs to a subsequent question in the argument. It is now referred to as bearing upon the construction of the proclamation, and consequently upon the question of *intent* to break *a blockade*. It is true that the proclamation calls it a blockade. But the message speaks of it as proceedings '*in the nature of a blockade*.' And the proclamation itself, by its terms and provisions, substantially conforms to the latter description. It founds itself upon the existence of '*an insurrection*.' It pronounces the disturbance to be by '*a combination of persons*.' It proceeds upon the Acts of Congress provided for '*insurrections*' by '*combinations of persons*.' It declares that the executive measures are provisional and temporary only, '*until Congress shall have assembled and deliberated upon the said unlawful proceedings*.' It requires the seceded

States to disperse, and return peaceably ' to their respective place of abode in twenty days.'

These ' combinations of persons,' and these ' unlawful proceedings,' are not at all recognized as presenting a case for belligerent rights and obligations. Naturally and prudently, the President did not assume to proclaim a strict blockade, with the extreme rights which obtain between belligerents, and with the corresponding rights of neutrals. He first called out the *militia of the States*, as such. He then used the army and the navy, under the Act of 1807. But he knew that this was not war. It was the suppression of insurrection. Consequently, in this use of the navy, he did not contemplate capture *jure belli*. Long after the period involved in this case, he maintained to all the civilized world, (see Mr. Seward's diplomatic correspondence, 1861,) that to attribute anything of belligerent right to these ' *combinations of persons* ' and these ' *unlawful proceedings*,' was an outrage and an offence to the United States. In effect, his position was
p. 643 that it was purely a *municipal* question ; and, | of course, there could be no blockade, in the international sense, and no capture *jure belli*.

Accordingly, the proclamation threatens not the regular proceedings of a prize Court, but ' *such proceedings as may be deemed advisable.*' And these proceedings are to follow upon a seizure to be made in the precise and only case where a vessel shall have attempted to enter or leave a port, and shall have been ' duly warned by the commander of one of the blockading vessels, who will endorse on her register the fact and date of such warning ; *and if the same vessel shall again* attempt to enter or to leave,' &c., then these undescribed proceedings shall take place.

Under these circumstances, upon the question of intent, it is submitted that the case is with the claimant.

But II. The terms of the proclamation, assuming it to have intended a *blockade*, (*jure belli*,) excuse this vessel and cargo. The only authority necessary to be referred to here is the case of *Md. Ins. Co.* vs. *Woods*, (6 Cr., 49,) decided by this Court. It is to be argued from, *a fortiori*. The qualified blockade, by a belligerent, was recognized. Notoriety of blockade in fact, and perhaps actual knowledge, are admitted in that case. But because a special warning off was provided for in this notice of the blockade, restoration was decreed. This Court said there, that they could not perceive the reasons for this modification. Nevertheless, they held it imperative. Here, the reasons are apparent.

III. This seizure took place before Congress had convened to act in the premises. It was made during that period when the President, casting about among doubtful expedients, had used the navy, under the Acts of Congress, for suppressing insurrection and repelling invasion, and had used this force ' *in the nature* of a blockade.' It is denied that during this period there was WAR, or that the rights and obligations of war, either

under the municipal or international law, had arisen. Of consequence, blockade and the prize jurisdiction could not have existed. The question here is, how can the United States, under the Constitution, be involved in war? And, to admit for a moment a | modern question, who has the power p. 644
to accept, recognize, or admit a state of *war*, so that such a *status* will affect the people of the States, and foreign nations and their subjects, with the consequences of war, municipally and internationally? How are treaties suspended or abrogated? When are citizens residing in the several States placed in the condition of alien enemies, or of persons (*nolens volens*) identified with the Territory of a public enemy, in a state of public war, whether foreign or civil?

And, again, if this was not *war*, in any legal sense, who has the power of closing a port of entry of the United States against the trade of a foreign nation, to whom all ports of entry are open by treaty? This vessel and her cargo were wholly Mexican. The Port of New Orleans was a port of entry, open to her, for ingress and egress, and for all lawful commerce. How was it closed? It is clear that it was not closed by legislation. Nor was the Treaty with Mexico, which might have been suspended or abrogated by Act of Congress, (being only the 'supreme law of the land,' in the same sense with such acts,) in any degree disturbed by the National Legislature.

Now, this decree of condemnation could only be founded upon one of two alternatives: *seizure* under the municipal law, or *capture* under the international law, for violation, or attempt at violation, of a blockade.

It is plain that there was no municipal law by which it could be justified. The President cannot make, alter, or suspend 'the supreme law of the land;' and this condemnation rests solely upon his authority.

IV. Was it capture? Blockade is a belligerent right. There must be war, before there can be blockade in the international sense, giving jurisdiction in prize. There may be an interruption of commerce, '*in the nature of a blockade.*' But this is the exercise of the legislative power, and is purely municipal. The distinction is plainly shown in *Rose* vs. *Himely*, (4 Cr., 272). But this legislative power does not reside in the President. The Constitution, in its first section, lays the corner-stone of the edifice it was erecting, declaring that '*all* legislative powers herein *granted* shall be vested in a Congress of the United States, | which shall p. 645
consist,' &c. Therefore, it only remains to inquire, was there *war*?

But it has been objected that this question is not open here to this foreign claimant. This is a mistake. It is a principle of the law of nations that 'the *sovereign* power of the State has alone the authority to make war.' Wheat. on Captures, 40; Wildman, vol. 2, chap. 1. And Vattel (Lib. III, cap. 1, sec. 4) says: 'The *sovereign* power has alone the authority to make war. But as the different rights which constitute this

power, originally resident in the body of the nation, may be separated or limited, according to the will of the nation, *we are to seek the power of making war in the particular Constitution of each State.*' And Bacon (Ab. Tit. Prerogative) says: 'It is *intex jura summi imperii*, and in England is lodged in the King; though, as my Lord Hale says, it ever succeeds best when done by parliamentary advice.'

The counsel for the United States, speaking for the President, take very bold and very alarming positions upon this question. One of them testifies, in well-considered rhetoric, his amazement that a judicial tribunal should be called upon to determine whether the political power was authorized to do what it has done. He is astounded that he should be required to 'ask permission of your Honors for the whole political power of the Government to exercise the ordinary right of self-defence.' He pictures to himself how the world will be appalled when it finds that '*one of our Courts*' has decided that 'the war is at an end.' He tells us that this is merely a Prize Court, and that the Prize Court sits 'by commission of the sovereign,' merely as 'an inquest to ascertain whether the capture has been made according to the will and intent of the sovereign.' That, all the world over, the Courts merely *construe* the acts of the political power. That *war* is only 'a state of things.' It is the conflict of opposing forces, with guns and swords and bayonets, in large numbers; and the Executive power being actually engaged in such conflict, war exists conclusively for this 'one of our Courts,' sitting by 'commission of the sovereign.'

p. 646 Another of the learned counsel tells us that 'the sovereign | has assumed the responsibility. *His* Prize Court has no commission to thwart his purpose, or overrule his construction of the law of nations.' And he added a significant admonition—that if 'the pure and simple function of the Prize Court be transcended, then the Court is no longer a Court of the sovereign, but an ally of the enemy.'

What place is this, where such thoughts are uttered? If the question were asked literally, and the dull walls of this old Senate Hall could comprehend and answer, they would give back in echoes the voices of departed patriots and statesmen—'this place is sacred to the Constitution of the United States.'

But what tribunal is this? Is it 'one of our Courts?' Does it sit 'by commission of the sovereign?' Who is its sovereign? and what is its commission? It acknowledges the same sovereign, and none other, that is sovereign of the President and of Congress—the 'respective States,' and 'the people' thereof. It has the same commission, and none other, which gives authority to the President and to Congress—the Constitution. It arose at the creation of this Government, coeval and co-ordinate with the Executive and Legislature, independent of either

or both. More, it was charged with the sublime trust and duty of sitting in judgment upon their acts, for the protection of the rights of individuals and of States, whenever ' a case ' should come before it, as this has come, challenging the Constitutional authority of such acts.

This is a Government created, defined, and limited by a *written* Constitution, every article, clause, and expression in which was pondered and criticised, as probably no document in the affairs of men was ever before tested, refined, and ascertained. It is the office of this Court, as an organic element of the Government, to construe this *Magna Charta*, and to bring all cases which come before it to this test. So that, as well by the peculiar quality of this Court, as by the clear doctrine of the law of nations, the question is here to be put and answered, *was there war?* Not, was there '*a state of things*' involving in point of fact all the deadly machinery, and all ' the pomp and circumstance ' of war ; but, had ' the sovereign power of the State ' | declared war ; declared that it should p. 647
exist, or that, by the act of an enemy, it *did already* exist ; war with its legal incidents municipal and international ?

In this first great experiment of a written Constitution, of course it was explicitly and exclusively declared, in words as plain as language affords, where this tremendous power should reside. *To Congress* is entrusted the power ' to declare war, grant letters of marque and reprisal, and make rules concerning captures on land and water.' Art. I., sec. 8, par. 11.

It is not pretended that at the time of this so-called capture, Congress had declared that there should be war, or that war existed, or had in any manner dealt with the question of war. The ' state of things ' which the counsel for the Government call ' war,' had arisen in vacation. But the Constitution had expressly provided for this case, and plainly distinguished it from ' war.' This necessity for national defence or offence, by military force, might arise by '*insurrection or invasion.*' The former is domestic, the latter foreign violence. But even in this latter case, namely, an invasion by a foreign nation, in itself an act of war by that nation, the Constitution did not depart from its inexorable rule that the country could only be involved in the legal consequences of war by Act of Congress. It contemplated temporary measures by the Executive. It authorized Congress '*to provide for calling forth the militia to execute the laws of the Union, suppress insurrections, and* REPEL INVASIONS.' Art. I., sec. 8, par. 15. So that, side by side, the two cases are distinctly provided for ; the power to suppress insurrections and repel invasions, which Congress might delegate to the President by a general law (as it did) ; and the power to put the country in a state of war, which was limited to Congress alone, acting upon the particular case.

But it has been maintained that the Acts of Congress passed subse-

quently to these seizures, have by retroaction recognized and validated a previous state of war. This is utterly inconsistent with the idea of a Government created by written Constitution. To affirm that when a careful and scrupulous distribution of powers has been made between
p. 648 the three great departments | of free Government, either one may exercise the powers of the other, and that a subsequent cession or approval by the competent power will validate the act, is to convert the Constitution into a mere shadow. The maxim between private principal and agent, '*omnis ratihibitio*,' &c., cannot apply. The supposed '*ratihibitio*' is not by the principal who speaks in the Constitution, but by another agent of the principal having no right to delegate the special power. The matter then comes back necessarily to the pure question of the power of the President under the Constitution. And this is, perhaps, the most extraordinary part of the argument for the United States. It is founded upon a figure of speech, which is repugnant to the genius of republican institutions, and, above all, to our written Constitution. It makes the President, in some sort, the impersonation of the country, and invokes for him the power and right to use all the force he can command, to '*save the life of the nation.*' The principle of self-defense is asserted; and all power is claimed for the President. This is to assert that the Constitution contemplated and tacitly provided that the President should be dictator, and all Constitutional Government be at an end, whenever he should think that 'the life of the nation' is in danger. To suppose that this Court would desire argument against such a notion, would be offensive.

It comes to the plea of necessity. The Constitution knows no such word. When it pronounced its purpose 'to form a perfect Union, establish justice, secure domestic tranquillity, provide for the common defense, promote the general welfare, and secure the blessings of liberty to ourselves and our posterity,' it declared that to these ends the people did '*ordain and establish this Constitution.*' In this form, and by these means, and by this distribution of powers, and not otherwise, did they provide for these ends; and they excluded all others. Any other means and powers are not Constitutional, but revolutionary.

The whole matter, comes, then, to a few propositions. To justify this condemnation, there must have been *war* at the time of this so-called capture; not war as the old essayists describe it, beginning with the war
p. 649 between Cain and Abel; not a fight | between two, or between thousands; not a conflict carried on with these or those weapons, or by these or those numbers of men; but war as known to international law—war carrying with it the mutual recognition of the opponents as *belligerents*; giving rise to the right of blockade of *the enemy's* ports, and affecting all other nations with the character of neutrals, until they shall have mixed them-

selves in the contest. War, in this, the only sense important to this question, is matter of law, and not merely matter of fact.

But the Constitution, providing specially not only for armed opposition to the law, and for insurrection (embracing its largest proportions,) but also for *invasion by a foreign enemy*, treats as totally distinct the question of *war*. It contemplates all these contingencies. For the execution of the law, for insurrection, and for *invasion*, (an act of war,) Congress provided by the Acts of 1792, 1795, and 1807.

For the case of *war*, that is, to put the country in a state of war, with the municipal and international incidents of war, Congress did not provide; because the Constitution confided that case to Congress, as exclusively and without power of delegation, as it granted the judicial power to this Court and such inferior tribunals as Congress might create. Congress had not declared war to begin, or to exist already, at the date in question. Therefore, war did not exist; blockade did not exist; and there could be no capture for breach of blockade, or intent to break it.

The power of the Executive in respect of insurrection and invasion is derived from the Constitution, and cannot transcend the limits and provisions imposed by that instrument. The President is Commander-in-Chief of the Army and Navy. He may use these forces in case of opposition to the laws, insurrection, or invasion, as Congress has provided. But when he has thus used the whole force of the nation, he has only used a power which Congress is authorized to confer upon him in the special cases enumerated in the Constitution. *War* is reserved to the judgment of Congress itself, upon the actual case arisen.

The idea of retroaction, validating the usurpation of authority, | is p. 650
incompatible with the theory of this Government, founded upon a written Constitution distributing with exactness the powers which it confers.

Mr. Dana. The case of the Amy Warwick presents a single question, which may be stated thus: At the time of the capture, was it competent for the President to treat as prize of war property found on the high seas, for the sole reason that it belonged to persons residing and doing business in Richmond, Virginia?

There are certain propositions applicable to war with acknowledged foreign nations, which must first be established. An examination of the reasons on which these propositions rest will aid in determining whether the propositions are also applicable to internal wars. The general rule may be stated thus:

Property found on the high seas, subject to the ownership and control of persons who themselves reside in the territory of the enemy, and thus subject to the jurisdiction and control of the enemy, is liable to capture as prize of war. (Wheaton's Int. Law, 429, 400); (1 Kent's Comm., 56–60, 74–77); (3 Phillimore's Int. Law, § 85, 483, 484); (Halleck's Int. Law,

470–2, 701) ; *The Amy Warwick*, (24 Law Rep., 335) ; *The Amy Warwick*, (24 Law Rep., 494) ; *Venus*, (8 Cr. 280) ; *Sally*, (8 Cr. 384) ; *Frances*, (8 Cr. 363) ; *Bella Guidita*, (1 Rob. 207) ; *Gerasimo*, (11 Moore Pr. C. 86) ; *Aina*, (38 Eng. Law & Eq. R. 600) ; *Abo*, (29 Eng. Law & Eq. R. 594) ; *Industrie*, (33 Eng. Law & Eq. R. 572) ; *Ida*, (Spinke's R. 33) ; *Baltic*, (11 Moore's Pr. C. 111) ; *Brown* vs. *United States*, (8 Cranch, 110) ; *The Hallis Jackson*, (Betts, J.) ; *The N. Carolina*, (Betts, J.) ; *Pioneer*, (Betts, J.) ; *Crenshaw*, (Betts, J.) ; *Gen. Green*, (Betts, J.) ; *Chester*, (2 Dall. 41) ; *Thirty hdds. sugar*, (9 Cr. 191) ; *Betsey*, (2 Cr. 64) ; *Mailey* vs. *Shattuck* (3 Cr. 488) ; *Livingstone* vs. *M. I. Co.*, (7 Cr. 506) ; *Escott*, (1 Rob. 203, n.) ; *Lady Jane*, (Rob., 202) ; *Hoop*, (1 Rob., 198) ; *Indian Chief*, (3 Rob., 12) ; *Danous*, (4 Rob., 255 n.) ; *Anna Catherina*, (4 Rob., 107) ; *President*, (5 Rob., 277) ; *The Meaco*, (Grier, J.) ; *The Marathon*, (Grier, J.) ; *The Amelia*, (Grier, J.) ; *Edw. Barnard*, (Betts, J.) ; *S. Inde-*
p. 651 *pendence*, (Sprague, J.) ; *Victoria*, | (Sprague, J.) ; *Charlotte*, (Sprague, J.) ; *Gen. Parkhill*, (Cadwalader, J.)

The above cases will be found to sustain the following propositions which I suppose will not be controverted, as applicable to cases of war with a recognized foreign power, and therefore are not elaborated.

First. It is immaterial in such case, whether the owner of the property has or has not taken part in the war, or given aid or comfort to the enemy, under whose power he resides.

Second. It is immaterial whether he be or be not, by birth or naturalization, a citizen or subject of the enemy ; and if he be, whether he be loyal to his sovereign, or in sympathy with and actually aiding the capturing power.

Third. He may be a subject of a neutral sovereign. He may even be a special and privileged resident, as consul of a neutral power. Still, if property subject to his ownership and control, while he so resides, is found at sea, engaged in commerce, though it be lawful commerce with neutrals, it comes under the rule. Its capture is one of the justifiable modes of coercing the enemy with whom he resides.

Fourth. The owner may even be a citizen of the country making the capture ; and there may be no evidence that he is disloyal to his own country, or that his residence with the enemy is not accidental or forcible. These are immaterial inquiries. The loss to him is immaterial, in the judicial point of view. The recognized right to coerce the enemy power affects the property, as it was situated when captured. The Court can look no farther. It is a political question whether the exercise of the right shall be insisted on.

Fifth. It is not necessary to show that the property in the particular case, if not captured, or if restored, would in fact have benefitted the enemy, and that its capture would tend to the injury of the enemy. The

laws of war go by general rules. Property *in a certain predicament* is condemned, the general rule being founded on the experience and concession that property so situated is or may be useful to the enemy in the war, and that | the rights of neutrals and the dictates of humanity do not p. 652
forbid its capture.

Sixth. It is not necessary that the property shall be at the time on a voyage to or from the enemy's country. The reason for the rule ordinarily seems stronger where the voyage is directly to the enemy's country, so that but for the capture it would have been actually subject to his control. But the rule is the same, wherever the vessel is bound. We have a right to prevent commerce and its gains on the part of persons residing in the territory of the enemy. And if the owner is friendly to the power under which he lives, the proceeds, subject to order in a foreign port, may be especially useful to that power.

I will now proceed to an examination of the reasons on which the preceding propositions rest, and afterwards consider whether those reasons are not equally applicable to an internal war.

WAR is simply the exercise of force by bodies politic, or bodies assuming to be bodies politic, against each other, for the purpose of coercion. The means and modes of doing this are called belligerent powers. The customs and opinions of modern civilization have recognized certain modes of coercing the power you are acting against as justifiable. Injury to private persons or their property is avoided as far as it reasonably can be. Wherever private property is taken or destroyed, it is because it is of such a character, or so situated, as to make its capture a justifiable means of coercing the power with which you are at war. For war is not upon the theory of punishing individuals for offences, on the contrary (except for violations of rules of war), it ignores jurisdiction, penalties and crimes, and is only a system of coercion of the power you are acting against.

If, then, the hostile power has title or direct interest in the property, as if it is public property, it is, of course, liable to capture.

If the property is of a character ordinarily used in war, and in the possession of that power, or on its way to his possession, it is liable to capture. In such case it is immaterial in whom is the title.

The hostile power has an interest in the private property of | all persons p. 653
living within its limits or control ; for such property is a subject of taxation, contribution, confiscation and use, with or without compensation. But the humanity of modern times has abstained from the taking of private property not liable to use in war, when on land. Some of the reasons for this, are, the infinite varieties of its character, the difficulty of discriminating among these varieties, the need of much of it to support the life of non-combatant persons and animals, and, above all, the moral dangers attending searches and captures in households. But on the high

seas, these reasons do not apply. Strictly personal effects are not taken. Merchandise sent to sea, is sent voluntarily, embarked by merchants on an enterprise of profit, taking the risks, is in the custody of men trained and paid for the business, and its value is usually capable of compensation in money. The sea is *res omnium*. It is the common field of war, as well as of commerce. The object of maritime commerce is the enriching of the owner by the transit over the common field, and it is the most usual object of revenue to the power under whose government the owner resides.

For these and other reasons, the rule of coercion by capture is applied to private property at sea. *If the power with which you are at war has such an interest in its transit, arrival or existence, as to make its capture one of the fair modes of coercion, you may take it. The reason why you may capture it is that it is a justifiable mode of coercing the power with which you are at war. The fact which makes it a justifiable mode of coercing that power, is that the owner is residing under his jurisdiction and control.*

It is therefore evident, from this course of reasoning, that the capture in case *of enemy property does not rest at all on any actual or constructive criminality or hostility of the owner.* Suppose him to be a neutral, he has a right to reside with your enemy, and trade to and from thence, as against all your laws and the laws of war. If he is a loyal subject of your own, and is accidentally or forcibly detained in your enemy's country, and even is struggling to get away, his property is liable to capture, on this general principle. It is for the political power alone to say whether it will forego
p. 654 the condemnation. The Courts must | adjudicate it to be a lawful prize. If he be a born and willing subject of your enemy, your right to capture is none the greater, nor is the legal reason for the capture different, though the reason may be more gratifying to the moral sense, and the capture more satisfactory. If the trader residing there is suspected of disaffection to that power, and of affection for you, his property is all the more likely to be subjected to contributions, if not actual confiscation by your enemy. He is not his own master, still less the master of his property. He and it are under your enemy's jurisdiction and control. You may capture it and refuse to restore it to the claimant, while he so resides and the war lasts, even if you compensate or remunerate him afterwards. But that is a political question. The Courts can only condemn it, if the political power asks for its condemnation.

Such being the rules applicable to external wars, and such the reasons on which the rules rest, we come to the question whether they are not equally applicable to internal wars ?

But, first, the following general rule is established on authority.

In internal wars, it is competent for the sovereign to exercise belligerent powers generally. *Rose* vs. *Himely*, (4 Cranch, 272) ; *Cherriot*

vs. *Foussett*, (3 Binney, 253); *Dobrie* vs. *Napier*, (3 Scott, 225); *Santissima Trinidad*, (7 Wheat., 306); *United States* vs. *Palmer*, (3 Wheat., 635); (Wheaton's International Law, p. 363, 5); (Grotius de Jure Belli, Prol. sec. 25); Burlamaqui, (N. & P. L., 263); (2 Rutherf. Inst., 503); (Hay & Marriot, 47, 23, 197, 216, 78, 94, 83); *Bynk, L. of W.*, (3 Hall's L. J., p. 11); *The Admiral*, (Grier, J., Law Int., Sep. 19, 1862); *The Marathon*, (Grier, J.); *The Meaco*, (Grier, J.); *The Amelia*, (Grier, J.); *Amy Warwick*, (24 Law Rep., 335, 494); *Gen. Parkhill*, (Cadwalader, J.); *Tropic Wind*, (Dunlop, J.); *Hiawatha, Hallis Jackson, Crenshaw, N. Carolina, etc.*, (Betts, J.)

None of the above cited cases make any distinction among belligerent powers, but treat them all as equally open to the sovereign in case of internal war.

The reasons on which the rules respecting belligerent powers rest, are applicable to internal wars as well as to external wars. |

(1.) The object of the sovereign is to coerce the power which is or- p. 655
ganized against him, and making war upon him.

(2.) This power exercises jurisdiction and control *de facto*, and claims it *de jure* over the territory. It compels obedience, and exacts allegiance from all inhabitants of the territory, without respect to their wishes. It compels each inhabitant to pay taxes and imposts upon his property, to aid in the war, and makes his property liable to contribution or confiscation. This power therefore has the same interest in the merchandise of an inhabitant of the territory at sea, for the purposes of the war, as if it were an acknowledged sovereign. And the parent state has the same interest in the capture of the property, for the purpose of coercing the rebel power.

(3.) The right of the sovereign to capture it *jure belli*, is *not derived from any actual or presumed disloyalty or criminality of the owner.* It is equally immaterial, as in a foreign war, whether the owner is a citizen, alien or friend. Whether in other respects he has taken part in the war, or on which side. Whether the rebel power considers him faithful to them, or suspects him, or has him in prison as a traitor. The test and the reason is *the predicament of the property.*

(4.) If the owner was hostile to the *de facto* government under which he lives, and they had actually declared the property in question to be confiscated, before its capture, it would not be doubted that it was subject to capture. But their laws and rules respecting allegiance, obedience, contribution, confiscation and taxation, govern and affect this property, *in fact* (although, the sovereign will not admit *de jure*), so long as it is out of the actual custody and control of the parent sovereign.

(5.) It does not follow from his residence that the owner of the property in civil wars, owes general allegiance to the sovereign. He may

be an alien, or even a mercenary soldier, or a political agent of some power that has recognized the rebels as a nation.

(6.) Suppose a part of a sovereign's dominions are wrested from him in public war, and his enemy establishes a civil as well as military govern-
p. 656 ment over it, and claims it as his own, | and the local authorities and a majority of the inhabitants acquiesce in the new dynasty, and it is established *de facto*, can it be doubted that it is *competent* for the sovereign to capture property of its inhabitants, at sea, as a means of coercion of the power possessing it ?

It is still a political question with the sovereign, whether he will capture such property, and if condemned, whether, after a peace, he will compensate the owner, on proof of merit.

I will now consider certain objections made to the application to internal wars of the doctrine of *enemy's property*.

(1.) It is objected that the exercise of this power is inconsistent with the claim to civil jurisdiction over the owner.

Not more so than in foreign war. There the property of a subject is liable to capture, if it is in a certain predicament, *e.g.* if it is the peculiar product of enemy territory, and exported thence, or if the owner resides (however unwillingly) in the enemy's territory and under his jurisdiction.

(2.) It is objected that so the property of a loyal citizen may be condemned.

Not more so, than in foreign war. The property in the given predicament may belong to a loyal friend and subject, or an indifferent neutral. It is a political question whether the right shall be exerted over all such property, on reasons of general policy, or whether exceptions shall be made in case the owner so resident is loyal to us, or sympathizes with us.

(It is worthy of remark that the sovereign can exercise these belligerent powers at first, if ever. The lapse of time gives him no new rights of war. The recognition of the rebel state as belligerent by foreign powers, confers no right on the sovereign. It only recognizes an existing right. The recognition of rebel States as sovereign by foreign powers, confers on the sovereign no new war power. The moment he ceases to claim jurisdiction over the rebel territory, the war ceases to be a civil war, and becomes an international war.

The objections really amount to this, that *war powers can never be exercised in civil wars, at any stage, except by the rebels.*

p. 657. According to this theory, if the civil war is one in which each | party claims to be the state, neither can exercise belligerent powers. If neither makes that claim, both may exercise them. If one claims to be the state, and the other does not, (as in this case,) the latter only can exercise them.)

(3.) It is contended that if |the owner is a traitor, his property is

exempt from confiscation by the Constitution. Art. 3, sec. 3, and the Act 1790, ch. 9, sec. 24.

But there is no allegation or evidence that the claimants of this property are traitors. The Government has never treated or proceeded against them as such. And if they be traitors, they cannot compel the Government to proceed against them by indictment as traitors, and bring them within the clause of the Constitution. It cannot be admitted that the clause of the Constitution would exempt their personal property from confiscation, by proof on their part, of the commission of treason by them, if they were not proceeded against as traitors.

(4.) If it is objected that a traitor cannot personally be treated as a belligerent, or as levying war, I answer that the Constitution not only contemplates that treason may take the form of war, but confines treason, under our laws, to acts of such character and magnitude as amount to '*levying war* against the United States,' or aiding those who are so levying war. Constitution, art. 3, sec 3.

Having then established the position that in internal wars the sovereign may exercise belligerent powers, and that captures on the high seas on the ground of enemy's property form no exception to the rule, and are equally open to him with other powers, we come to consider what must be the condition of territory on which the owner resides to make his property enemy's property within the meaning of the law of prizes.

First. What is the rule in the case of external wars ?

It is not necessary that the residence should be within the regular dominions of the enemy, as they were when the war began, or as they shall have since been established by treaty or public law.

It is sufficient if the territory is in the permanent occupation | of the p. 658
enemy, who has established himself there, not avowedly for temporary purposes, but to hold so long as war shall enable him to hold it. If the enemy has established a civil and military government over it, and claims and exacts allegiance from all inhabitants, levies taxes, &c., the case admits of no doubt. *Gerasimo*, (11 Moore Pr. C. 101, cases there cited) ; *U. States* vs. *Rice*, (4 Wheat. 246) ; *The Meaco*, (Grier, J.) ; *Amy Warwick*, (Sprague, J., 24 Law Rep., 335) ; *Thirty hhds. sugar*, (9 Cr. 191).

The principles will be found fully discussed in the case of the *Gerasimo*, supra.

The reason of the rule is this : The property must either be condemned or restored to the claimant. If restored, it goes under his legal control. He is a resident of the enemy's country, and this property, so restored, would go into the control of the enemy and add to his resources. The object of maritime capture is to straiten and reduce the enemy's means and resources. *Ex. gr.* if this ship had been permitted to go to Richmond, she and her cargo would have paid duties to the rebel govern-

ment. They could have taken the vessel for military purposes. They could have taken the cargo for military necessities, with or without compensation as they should see fit. If they regarded the owner as an enemy, they could take it as a prize of war, or by way of confiscation.

(The law of prize of war, which condemns property that even by misfortune of a friendly owner, is impressed with a hostile character, or is going, when captured, into enemy's control, or will so go if restored, must not be confounded with municipal forfeiture or confiscation, which is usually penal or punitive for some offence of the owner.)

These reasons show that they are equally applicable to internal wars. The test is whether *the residence of the owner is under the established de facto jurisdiction and control of the enemy.*

In the *Castine* case, (*U. S.* vs. *Rice,* supra) there can be no doubt that it was *competent* for our Government to capture a vessel bound into that port in that state of things, and belonging to a person residing there,
p. 659 without reference to whether he was, | as to his general political allegiance, a citizen of the United States, or a neutral alien, or a British subject.

It is not necessary to draw a fine line as to what is to be deemed enemy's territory, for the purpose of deciding this case,—if the above principles are applicable to internal war. I suppose it will be conceded that the nature and character of the occupation of Richmond, Va., was more than sufficient to constitute it enemy's territory, within the meaning of the rule.

We are now brought to another branch of the question before the Court. Conceding that the Sovereign may exercise belligerent powers in internal wars, and that capture on the ground of enemy's property is among those powers, and that Richmond was enemy's territory—it is still contended that under our Constitution, the exercise of these powers was not made by the proper authorities, and in the proper state of things.

It is contended that the President cannot exercise war powers until Congress shall first have 'declared war,' or, at least, done some act recognizing that a case exists for the exercise of war powers, and of what war powers.

There is nothing in the distribution of powers under our Constitution which makes the exercise of this war power illegal, by reason of the authority under which this capture was made.

I. It is not necessary to the exercise of war powers by the President, in a case of foreign war, that there should be a preceding act of Congress declaring war.

The Constitution gives to Congress the power to 'declare war.'

But there are two parties to a war. War is *a state of things,* and not an act of legislative will. If a foreign power springs a war upon us by sea and land, during a recess of Congress, exercising all belligerent rights of

capture, the question is, whether the President can repel war with war, and make prisoners and prizes by the army, navy and militia which he has called into service and employed to repel the invasion, in pursuance of general acts of Congress, before Congress can meet? or whether that would be illegal?

In the case of the Mexican war, there was only a subsequent | recognition p. 660
of a state of war by Congress; yet all the prior acts of the President were lawful acts of war.

It is enough to state the proposition. If it be not so, there is no protection to the State.

The question is not what would be the result of a conflict between the Executive and Legislature, during an actual invasion by a foreign enemy, the Legislature refusing to declare war. But it is as to the power of the President before Congress shall have acted, in case of a war actually existing. It is not as to the right *to initiate a war, as a voluntary act of sovereignty*. That is vested only in Congress.

II. In case of civil war, the President may, in the absence of any Act of Congress on the subject, meet the war by the exercise of belligerent maritime capture.

The same overwhelming reasons of necessity govern this position, as the preceding.

This position has been recognized by every Court into which the prize causes have been brought in this country, by Judge Dunlop, the District of Columbia; Judge Giles, in Maryland; Judge Marvin, in Florida; Judge Betts, in New York; Judge Sprague, in Massachusetts; Judge Cadwalader, in Pennsylvania.

There are general Acts of Congress clothing the President with power to use the army and navy to suppress insurrections. Act 1795, ch. 36, sec. 2; Act 1807, ch. 39.

And it must be admitted that the function of using the army and navy for that purpose is an Executive function. But it is contended that before they are used as belligerent powers, before captures can be made, on grounds of blockade and enemy property, Congress must pass upon the case, and determine whether the powers shall be exerted.

Now, if Congress must so adjudge in the first instance, why not throughout the war? Civil wars change their character, from day to day and place to place. Congress should be a council of war in perpetual session, to determine when, how long, and how far this or that belligerent right shall be exerted.

The function to use the army and navy being in the President, the mode of using them, within the rules of civilized warfare, | and subject to p. 661
established laws of Congress, must be subject to his discretion as a necessary incident to the use, in the absence of any Act of Congress controlling him.

III. There were no Acts of Congress at the time of this capture (July 10, 1861,) in any way controlling this discretion of the President.

IV. Since the capture, Congress has recognized the validity of these acts of the President.

The Act Aug. 6, 1861, ch. 63, sec. 3, legalizes, among other things, the proclamations, acts and orders of the President respecting the navy. This includes the blockades, and the orders respecting captures.

The Act March 25, 1862, ch. 50, regulating prize proceedings, in sec. 5, recognizes prize causes as ' now pending ' in the Courts.

The proclamations make the blockades belligerent acts, and not municipal surveillance. They are declared to be ' in pursuance of the law of nations,' and guaranteed to be made effective and actual, and provision is made for warning.

They had been always treated as blockades under the laws of war, by the Executive, by the Courts and by neutral powers, before the passage of this Act.

Act July 17, 1862, ch. 204, sec. 12, recognizes prize causes as *now pending*, and regulates them ; and recognizes decrees of condemnation in pending cases.

The Resolution of July 17, 1862 (No. 65), regulates the custody of prize money now in the Registry of the Courts.

When these acts were passed, Congress knew that great numbers of captures had been made, solely on the ground of ' enemy property ; ' that the President had, through the several U. S. Attorneys, asked for their condemnation; that they had been condemned, solely on that ground, in all the chief districts ; that condemnation on that ground had been refused in none ; and that the proceeds of prizes condemned as enemy property were in the Treasury awaiting distribution.

All the acts for the increase of the army and navy, and for raising volunteers, speak of this state of things as a ' war.' |

p. 662 It is contended that the Act of July, 1861, ch. 3, secs. 5 and 6, is an action by Congress on the subject, inconsistent with condemnation of this property.

To this, I reply :

I. The capture, in this case, was before the passage of the act. The statute does not retroact.

It is an established rule to interpret statutory law as taking effect from its passage, not as varying the law or its administration by retroactive operations. *Matthews* vs. *Zane*, (7 Wheat., 211) ; 1 Kent's Com., 455, notes.

The statute does not in its terms contemplate a retroactive effect, but rather the reverse. Congress at the time of passing it knew that the President had exercised, as of right, full belligerent power to capture at

sea on all the recognized grounds of war,—contraband, breach of blockade, and enemy property; and that the Courts were entertaining prize jurisdiction on those grounds.

Under such circumstances, if Congress intended to make void all those acts, it should be expressed in terms, unless it were necessarily and unavoidably the result of the statute, construed with all the established presumptions against retroaction.

All the Courts of the United States which have acted on prize causes since the passage of the act, have construed it as not retroactive.

II. There is no inconsistency in Congress, declining to act on the exercise of war powers by the President in the past, and at the same time making new and special provisions, qualifying or altering the mode of exercising those powers after a future event.

III. To give it a retroactive effect, would render this statute inconsistent with the Act of August 6th, 1861, ch. 63, sec. 3.

IV. The Act of 13th of August, 1861, does not relate to belligerent captures and prizes. It provides for civil forfeitures and confiscations, in the exercise of civil jurisdiction.

(1.) The terms ' captures ' and ' prize ' are not used. The terms are ' seizure,' ' forfeiture,' and ' confiscation.' The former are terms of war, the latter, of civil proceedings. Park on Ins. | c. 4, p. 73; 2 Arnould on p. 663
Ins. § 303; *Richardson* vs. *M. F. & M. I. Co.*, (6 Mass., 108); Constitution of United States, Art. 1, sec. 8; *Higginson* vs. *Pomeroy*, (11 Mass., 110); *Black* vs. *Marine I. Co.*, (11 Johns., 292); *Thompson* vs. *Reed*, (12 S. & R., 443); Halleck's Int. Law, ch. 12, § 14; Halleck's Int. Gov., c. 30; *Rhinelander* vs. *I. Co. of Pa.*, (4 Cr., 42, 44); *Carrington* vs. *Merch. I. Co.*, (8 Pet., 518, 519); *Bradstreet* vs. *Neptune I. Co.*, (3 Sumner, 605, 616); *Davison* vs. *Seal Skins*, (2 Paine, 324).

(2.) The Secretary of the Treasury has full powers of remission of the ' forfeitures,' as in revenue cases, under Act of 1797, ch. 13, vol. 1, p. 506. This he may do, by general regulations of the Treasury Department. This is unknown to prize or belligerent proceedings, and inapplicable to them.

(3.) Sec. 9 gives jurisdiction over the ' forfeitures,' to certain Courts, which would be unnecessary if these were cases of prize.

(4.) The prize laws give an interest to the captors. Under this statute, the title rests in the United States by ' forfeiture.'

(5.) Sec. 6 introduces a principle unknown to prize law, to wit: That the whole vessel is condemned, on the sole ground that the owner of a part resided in enemy's territory. Congress can hardly have intended that.

That such is the true construction of the section, appears from the debates at the time of its passage.

This construction has been put upon it by the Courts, and the Treasury has adopted it, and authorized a remission of the forfeiture of the shares owned by residents in loyal States, under certain circumstances.

The true construction of the act, I respectfully submit to be this :

It is not an act specially providing for the present rebellion, or, in terms, alluding to it. It is a general act, applicable to all times, and to rebellions or civil wars, of every possible character. The President might or might not, at his option, apply it to the present rebellion by issuing or not his proclamation. The act is applicable, at the option of any President, to a rebellion which is carried on under State authority, and it is applicable to no other. |

p. 664 Property may often be so situated as to become the subject both of condemnation as prize of war, and forfeiture by civil law. In that case, the prize law has the precedence. The cases of the *Rapid, St. Lawrence, Alexander,* and *Joseph,* in (1 Gallison's Rep.).

In further proof that this statute was not intended to establish or regulate or modify or affect the law of prize, it is observable that it touches small portions of entire matters over which the President had been exercising the right of belligerent capture, and has exercised them still without objection by Congress.

Sec. 6 does not forfeit vessels of persons residing in the rebel States, if found in the ports of those States. A rebel man-of-war could not be forfeited under that act if found in their own ports, nor if found elsewhere, if the title was in a neutral or a citizen of a loyal State. (Nor could it be condemned under the Act of August 6th, 1861, unless the owner of the vessel knowingly allowed it to be used in the war.)

Sec. 5 forfeits no property unless passing between the designated States and the other States. If found in the rebel States, or passing between rebel States, it is not forfeited, even if it be contraband of war. (Nor would it be forfeited if found there, under the Act of August 6th, 1861, unless the owner had knowingly allowed it to be used in the war.) If found at sea, passing between two rebel States, or between a rebel State and a neutral port, it would escape. Under this statute, no property could be seized for breach of blockade, unless passing between a rebel and a loyal State ; no vessel could be seized for breach of blockade unless it was not only passing between a rebel and a loyal State, but carrying cargo ; and the fact that the property was contraband would not forfeit it or the vessel carrying it, if it was bound from a neutral port.

That the rebellion had come to a state requiring the exercise by us of the war powers of blockade and capture, has been passed upon by the political department of the Government,—by both the Executive and Legislative branches. That is conclusive on the Courts. President's proclamations of April 15, April 19, 1861, and April 27, May 3, 1861 ;

Acts of Congress, | Aug. 6, 1861, ch. 63, sec. 3; March 25, 1862, ch. 50; p. 665
and July 17, 1862, ch. 234, sec. 12.

Whether a particular place, which the owner of the vessel inhabits, is enemy's territory, is for the Court to decide. The *Gerasimo*, (11 Moore, Pr. C., 101).

If the political department of the Government has decided that question, that is, of course, conclusive on the Courts.

If it has not been passed upon by the political department, the Court must decide it as a question of fact.

In this case, the political department decided that Richmond was in enemy territory, on the 10th of July, 1861. Proclamation of April 27, 1861, and Aug. 16, 1861; Act of Congress of Aug. 6, 1861, ch. 63, sec. 3.

We are brought, then, to three propositions:—

I. The right to capture, on the high seas, the property of persons residing in the enemy's territory, may be exercised in internal war.

II. In the present war, that right has been exercised by an authority which this Court must deem competent.

III. Richmond, Virginia, was enemy's territory, within the meaning of the law of prize, *jure belli*, at the time of this capture.

Mr. Justice GRIER. There are certain propositions of law which must necessarily affect the ultimate decision of these cases, and many others, which it will be proper to discuss and decide before we notice the special facts peculiar to each.

They are, 1st. Had the President a right to institute a blockade of ports in possession of persons in armed rebellion against the Government on the principles of international law, as known and acknowledged among civilized States?

2d. Was the property of persons domiciled or residing within those States a proper subject of capture on the sea as 'enemies' property'?

I. Neutrals have a right to challenge the existence of a blockade *de facto*, and also the authority of the party exercising the right to institute it. They have a right to enter the ports | of a friendly nation for the p. 666
purposes of trade and commerce, but are bound to recognize the rights of a belligerent engaged in actual war, to use this mode of coercion, for the purpose of subduing the enemy.

That a blockade *de facto* actually existed, and was formally declared and notified by the President on the 27th and 30th of April, 1861, is an admitted fact in these cases.

That the President, as the Executive Chief of the Government and Commander-in-chief of the Army and Navy, was the proper person to make such notification, has not been, and cannot be disputed.

The right of prize and capture has its origin in the '*jus belli*,' and is governed and adjudged under the law of nations. To legitimate the

capture of a neutral vessel or property on the high seas, a war must exist *de facto*, and the neutral must have a knowledge or notice of the intention of one of the parties belligerent to use this mode of coercion against a port, city, or territory, in possession of the other.

Let us enquire whether, at the time this blockade was instituted, a state of war existed which would justify a resort to these means of subduing the hostile force.

War has been well defined to be, 'That state in which a nation prosecutes its right by force.'

The parties belligerent in a public war are independent nations. But it is not necessary to constitute war, that both parties should be acknowledged as independent nations or sovereign States. A war may exist where one of the belligerents, claims sovereign rights as against the other.

Insurrection against a government may or may not culminate in an organized rebellion, but a civil war always begins by insurrection against the lawful authority of the Government. A civil war is never solemnly declared; it becomes such by its accidents—the number, power, and organization of the persons who originate and carry it on. When the party in rebellion occupy and hold in a hostile manner a certain portion of territory; have declared their independence; have cast off their
p. 667 allegiance; have organized armies; have commenced hostilities | against their former sovereign, the world acknowledges them as belligerents, and the contest a *war*. *They* claim to be in arms to establish their liberty and independence, in order to become a sovereign State, while the sovereign party treats them as insurgents and rebels who owe allegiance, and who should be punished with death for their treason.

The laws of war, as established among nations, have their foundation in reason, and all tend to mitigate the cruelties and misery produced by the scourge of war. Hence the parties to a civil war usually concede to each other belligerent rights. They exchange prisoners, and adopt the other courtesies and rules common to public or national wars.

'A civil war,' says Vattel, 'breaks the bands of society and government, or at least suspends their force and effect; it produces in the nation two independent parties, who consider each other as enemies, and acknowledge no common judge. Those two parties, therefore, must necessarily be considered as constituting, at least for a time, two separate bodies, two distinct societies. Having no common superior to judge between them, they stand in precisely the same predicament as two nations who engage in a contest and have recourse to arms.

'This being the case, it is very evident that the common laws of war—those maxims of humanity, moderation, and honor—ought to be observed by both parties in every civil war. Should the sovereign conceive he has a right to hang up his prisoners as rebels, the opposite party will

make reprisals, &c., &c. ; the war will become cruel, horrible, and every day more destructive to the nation.'

As a civil war is never publicly proclaimed, *eo nomine*, against insurgents, its actual existence is a fact in our domestic history which the Court is bound to notice and to know.

The true test of its existence, as found in the writings of the sages of the common law, may be thus summarily stated : ' When the regular course of justice is interrupted by revolt, rebellion, or insurrection, so that the Courts of Justice cannot be kept open, *civil war exists* and hostilities may be prosecuted | on the same footing as if those opposing the p. 668
Government were foreign enemies invading the land.'

By the Constitution, Congress alone has the power to declare a national or foreign war. It cannot declare war against a State, or any number of States, by virtue of any clause in the Constitution. The Constitution confers on the President the whole Executive power. He is bound to take care that the laws be faithfully executed. He is Commander-in-chief of the Army and Navy of the United States, and of the militia of the several States when called into the actual service of the United States. He has no power to initiate or declare a war either against a foreign nation or a domestic State. But by the Acts of Congress of February 28th, 1795, and 3d of March, 1807, he is authorized to call out the militia and use the military and naval forces of the United States in case of invasion by foreign nations, and to suppress insurrection against the government of a State or of the United States.

If a war be made by invasion of a foreign nation, the President is not only authorized but bound to resist force by force. He does not initiate the war, but is bound to accept the challenge without waiting for any special legislative authority. And whether the hostile party be a foreign invader, or States organized in rebellion, it is none the less a war, although the declaration of it be ' *unilateral*.' Lord Stowell (1 Dodson, 247) observes, ' It is not the less a war on *that account*, for war may exist without a declaration on either side. It is so laid down by the best writers on the law of nations. A declaration of war by one country only, is not a mere challenge to be accepted or refused at pleasure by the other.'

The battles of Palo Alto and Resaca de la Palma had been fought before the passage of the Act of Congress of May 13th, 1846, which recognized ' *a state of war as existing by the act of the Republic of Mexico*.' This act not only provided for the future prosecution of the war, but was itself a vindication and ratification of the Act of the President in accepting the challenge without a previous formal declaration of war by Congress.

This greatest of civil wars was not gradually developed by | popular p. 669
commotion, tumultuous assemblies, or local unorganized insurrections. However long may have been its previous conception, it nevertheless

sprung forth suddenly from the parent brain, a Minerva in the full panoply of *war*. The President was bound to meet it in the shape it presented itself, without waiting for Congress to baptize it with a name ; and no name given to it by him or them could change the fact.

It is not the less a civil war, with belligerent parties in hostile array, because it may be called an ' insurrection ' by one side, and the insurgents be considered as rebels or traitors. It is not necessary that the independence of the revolted province or State be acknowledged in order to constitute it a party belligerent in a war according to the law of nations. Foreign nations acknowledge it as war by a declaration of neutrality. The condition of neutrality cannot exist unless there be two belligerent parties. In the case of the *Santissima Trinidad*, (7 Wheaton, 337,) this Court say : ' The Government of the United States has recognized the existence of a civil war between Spain and her colonies, and has avowed her determination to remain neutral between the parties. Each party is therefore deemed by us a belligerent nation, having, so far as concerns us, the sovereign rights of war.' (See also 3 Binn., 252.)

As soon as the news of the attack on Fort Sumter, and the organization of a government by the seceding States, assuming to act as belligerents, could become known in Europe, to wit, on the 13th of May, 1861, the Queen of England issued her proclamation of neutrality, ' recognizing hostilities as existing between the Government of the United States of America and *certain States* styling themselves the Confederate States of America.' This was immediately followed by similar declarations or silent acquiescence by other nations.

After such an official recognition by the sovereign, a citizen of a foreign State is estopped to deny the existence of a war with all its consequences as regards neutrals. They cannot ask a Court to affect a technical ignorance of the existence of a war, which all the world acknowledges to be the greatest civil war known in the history of the human race, and thus
p. 670 cripple the | arm of the Government and paralyze its power by subtle definitions and ingenious sophisms.

The law of nations is also called the law of nature ; it is founded on the common consent as well as the common sense of the world. It contains no such anomalous doctrine as that which this Court are now for the first time desired to pronounce, to wit : That insurgents who have risen in rebellion against their sovereign, expelled her Courts, established a revolutionary government, organized armies, and commenced hostilities, are not *enemies* because they are *traitors ;* and a war levied on the Government by traitors, in order to dismember and destroy it, is not a *war* because it is an ' insurrection.'

Whether the President in fulfilling his duties, as Commander-in-chief, in suppressing an insurrection, has met with such armed hostile resistance,

and a civil war of such alarming proportions as will compel him to accord to them the character of belligerents, is a question to be decided *by him*, and this Court must be governed by the decisions and acts of the political department of the Government to which this power was entrusted. 'He must determine what degree of force the crisis demands.' The proclamation of blockade is itself official and conclusive evidence to the Court that a state of war existed which demanded and authorized a recourse to such a measure, under the circumstances peculiar to the case.

The correspondence of Lord Lyons with the Secretary of State admits the fact and concludes the question.

If it were necessary to the technical existence of a war, that it should have a legislative sanction, we find it in almost every act passed at the extraordinary session of the Legislature of 1861, which was wholly employed in enacting laws to enable the Government to prosecute the war with vigor and efficiency. And finally, in 1861, we find Congress '*ex majore cautela*' and in anticipation of such astute objections, passing an act 'approving, legalizing, and making valid all the acts, proclamations, and orders of the President, &c., as if they had been *issued and done under the previous express authority* and direction of the Congress of the United States.' |

Without admitting that such an act was necessary under the circum- p. 671
stances, it is plain that if the President had in any manner assumed powers which it was necessary should have the authority or sanction of Congress, that on the well known principle of law, '*omnis ratihabitio retrotrahitur et mandato equiparatur*,' this ratification has operated to perfectly cure the defect. In the case of *Brown* vs. *United States*, (8 Cr., 131, 132, 133,) Mr. Justice Story treats of this subject, and cites numerous authorities to which we may refer to prove this position, and concludes, 'I am perfectly satisfied that no subject can commence hostilities or capture property of an enemy, when the sovereign has prohibited it. But suppose he did, I would ask if the sovereign may not ratify his proceedings, and thus by a retroactive operation give validity to them?'

Although Mr. Justice Story dissented from the majority of the Court on the whole case, the doctrine stated by him on this point is correct and fully substantiated by authority.

The objection made to this act of ratification, that it is *expost facto*, and therefore unconstitutional and void, might possibly have some weight on the trial of an indictment in a criminal Court. But precedents from that source cannot be received as authoritative in a tribunal administering public and international law.

On this first question therefore we are of the opinion that the President had a right, *jure belli*, to institute a blockade of ports in possession of the States in rebellion, which neutrals are bound to regard.

II. We come now to the consideration of the second question. What is included in the term '*enemies' property*?'

Is the property of all persons residing within the territory of the States now in rebellion, captured on the high seas, to be treated as 'enemies' property' whether the owner be in arms against the Government or not?

The right of one belligerent not only to coerce the other by direct force, but also to cripple his resources by the seizure or destruction of his property, is a necessary result of a state of war. Money and wealth, the
p. 672 products of agriculture and commerce, | are said to be the sinews of war, and as necessary in its conduct as numbers and physical force. Hence it is, that the laws of war recognize the right of a belligerent to cut these sinews of the power of the enemy, by capturing his property on the high seas.

The appellants contend that the term 'enemy' is properly applicable to those only who are subjects or citizens of a foreign State at war with our own. They quote from the pages of the common law, which say, 'that persons who wage war against the King may be of two kinds, subjects or citizens. The former are not proper enemies, but rebels and traitors; the latter are those that come properly under the name of enemies.'

They insist, moreover, that the President himself, in his proclamation, admits that great numbers of the persons residing within the territories in possession of the insurgent government, are loyal in their feelings, and forced by compulsion and the violence of the rebellious and revolutionary party and its '*de facto* government' to submit to their laws and assist in their scheme of revolution; that the acts of the usurping government cannot legally sever the bond of their allegiance; they have, therefore, a co-relative right to claim the protection of the government for their persons and property, and to be treated as loyal citizens, till legally convicted of having renounced their allegiance and made war against the Government by treasonably resisting its laws.

They contend, also, that insurrection is the act of individuals and not of a government or sovereignty; that the individuals engaged are subjects of law. That confiscation of their property can be effected only under a municipal law. That by the law of the land such confiscation cannot take place without the conviction of the owner of some offence, and finally that the secession ordinances are nullities and ineffectual to release any citizen from his allegiance to the national Government, and consequently that the Constitution and Laws of the United States are still operative over persons in all the States for punishment as well as protection.

p. 673 This argument rests on the assumption of two propositions, | each of

which is without foundation on the established law of nations. It assumes that where a civil war exists, the party belligerent claiming to be sovereign, cannot, for some unknown reason, exercise the rights of belligerents, although the revolutionary party may. Being sovereign, he can exercise only sovereign rights over the other party. The insurgent may be killed on the battle-field or by the executioner; his property on land may be confiscated under the municipal law; but the commerce on the ocean, which supplies the rebels with means to support the war, cannot be made the subject of capture under the laws of war, because it is '*unconstitutional!!!*' Now, it is a proposition never doubted, that the belligerent party who claims to be sovereign, may exercise both belligerent and sovereign rights, (see 4 Cr., 272.) Treating the other party as a belligerent and using only the milder modes of coercion which the law of nations has introduced to mitigate the rigors of war, cannot be a subject of complaint by the party to whom it is accorded as a grace or granted as a necessity. We have shown that a civil war such as that now waged between the Northern and Southern States is properly conducted according to the humane regulations of public law as regards capture on the ocean.

Under the very peculiar Constitution of this Government, although the citizens owe supreme allegiance to the Federal Government, they owe also a qualified allegiance to the State in which they are domiciled. Their persons and property are subject to its laws.

Hence, in organizing this rebellion, they have *acted as States* claiming to be sovereign over all persons and property within their respective limits, and asserting a right to absolve their citizens from their allegiance to the Federal Government. Several of these States have combined to form a new confederacy, claiming to be acknowledged by the world as a sovereign State. Their right to do so is now being decided by wager of battle. The ports and territory of each of these States are held in hostility to the General Government. It is no loose, unorganized insurrection, having no defined boundary or possession. It has | a boundary p. 674
marked by lines of bayonets, and which can be crossed only by force—south of this line is enemies' territory, because it is claimed and held in possession by an organized, hostile and belligerent power.

All persons residing within this territory whose property may be used to increase the revenues of the hostile power are, in this contest, liable to be treated as enemies, though not foreigners. They have cast off their allegiance and made war on their Government, and are none the less enemies because they are traitors.

But in defining the meaning of the term 'enemies' property,' we will be led into error if we refer to Fleta and Lord Coke for their definition of the word 'enemy.' It is a technical phrase peculiar to prize courts,

and depends upon principles of public policy as distinguished from the common law.

Whether property be liable to capture as 'enemies' property' does not in any manner depend on the personal allegiance of the owner. 'It is the illegal traffic that stamps it as 'enemies' property.' It is of no consequence whether it belongs to an ally or a citizen. 8 Cr., 384. The owner, *pro hac vice*, is an enemy.' 3 Wash. C. C. R., 183.

The produce of the soil of the hostile territory, as well as other property engaged in the commerce of the hostile power, as the source of its wealth and strength, are always regarded as legitimate prize, without regard to the domicil of the owner, and much more so if he reside and trade within their territory.

III. We now proceed to notice the facts peculiar to the several cases submitted for our consideration. The principles which have just been stated apply alike to all of them.

I. The case of the brig Amy Warwick.

This vessel was captured upon the high seas by the United States gunboat Quaker City, and with her cargo was sent into the district of Massachusetts for condemnation. The brig was claimed by David Currie and others. The cargo consisted of coffee, and was claimed, four hundred bags by Edmund Davenport & Co., and four thousand seven hundred bags by Dunlap, Moncure & Co. The title of these parties as respectively
p. 675 claimed | was conceded. All the claimants at the time of the capture, and for a long time before, were residents of Richmond, Va., and were engaged in business there. Consequently, their property was justly condemned as 'enemies' property.'

The claim of Phipps & Co. for their advance was allowed by the Court below. That part of the decree was not appealed from and is not before us. The case presents no question but that of enemies' property.

The decree below is affirmed with costs.

II. The case of the Hiawatha.

The Court below in decreeing against the claimants proceeded upon the ground that the cargo was shipped after notice of the blockade.

The fact is clearly established, and if there were no qualifying circumstances, would well warrant the decree. But after a careful examination of the correspondence of the State and Navy Departments, found in the record, we are not satisfied that the British Minister erred in the construction he put upon it, which was that a license was given to all vessels in the blockaded ports to depart with their cargoes within fifteen days after the blockade was established, whether the cargoes were taken on board before or after the notice of the blockade. All reasonable doubts should be resolved in favor of the claimants. Any other course would be in-

consistent with the right administration of the law and the character of a just Government. But the record discloses another ground upon which the decree must be sustained. On the 19th of April the President issued a proclamation announcing his intention to blockade the ports of the several States therein named.

On the 27th of April he issued a further proclamation announcing his intention to blockade the ports of Virginia and North Carolina in addition to those of the States named in the previous one. On the 30th of April Commodore Pendergrast issued his proclamation announcing the blockade as established. These proclamations were communicated to the British Minister as soon as they were issued. On the 5th of May the British Consul at Richmond wrote to Lord Lyons that he had advised | those representing the owners of the Hiawatha that there would be no p. 676
difficulty in her leaving in ballast. He added, ' *but to this they will not consent.*' On the 8th of May Lord Lyons made an application to the Secretary of State relative to this vessel. The matter was referred to the Navy Department. On the same day the Secretary of the Navy replied : ' Fifteen days have been specified as a limit for neutrals to leave the ports *after actual blockade has commenced*, with or without cargo, and there are yet five or six days for neutrals to leave : with proper diligence on the part of persons interested *I see no reason for exemption to any.*' Here was a distinct warning that the vessel must leave within the time limited, *after the commencement of the blockade*. On the 10th of May she completed the discharge of her cargo.

On the next day she commenced lading for her outer voyage, and by working night and day, on the 15th of May she had taken in a full cargo of cotton and tobacco. On that day the British Consul gave her a certificate, wherein he referred to the proclamation of the 27th of April, ' in which it was announced that a blockade would be enforced of the ports of Virginia,' and added, that ' the best information attainable ' ' pointed to the 2d of May as the day when an efficient blockade was supposed to have been established.'

On the 16th of May she was ready for sea, but there was no steam-tug in port to tow her down the river. At six o'clock, P. M., on the 17th she was taken in tow by the steam-tug David Currie. The tug had not sufficient power and the Hiawatha came to anchor again. On the 18th, at six o'clock, A. M., she was taken in tow by the steam-tug William Allison and towed out to sea. On the 20th of May she was captured in Hampton Roads, off Fortress Monroe, and taken with her cargo into the Southern District of New York for condemnation.

The energy with which the labor of lading her was pressed evinces the consciousness of those concerned at the peril of delay beyond the time limited by the proclamation for her departure. The time was fifteen days

from the establishment of the blockade. The blockade was effectual on the 30th of April.

p. 677 There is no controversy upon the subject. The fifteen days | expired on the 15th of May—the day she completed her lading. A vessel being in a blockaded port is presumed to have notice of the blockade as soon as it commences. This is a settled rule in the law of nations.

The certificate of the Consul states, that according to his information the blockade commenced on the 2d of May. It is not easy to imagine how he could have arrived at this conclusion. The James river is a great commercial thoroughfare. It would seem that news of so important an event must have swept up its waters to Richmond, as news of interest spreads along the streets of a city. Such circumstances must have immediately become known to the parties as were sufficient to put them upon inquiry, and were therefore equivalent to full notice. But, conceding the 2d of May to be the day from which the computation is to be made, then, the fifteen days expired on the 17th of May. Her voyage down the river was not effectively begun until the 18th of May. This was after the expiration of the time allowed. In either view she became delinquent, and was guilty of a breach of the blockade. The proclamation allowed fifteen days—not fifteen days, *and until a steam-tug could be procured.* The difficulty of procuring a tug was one of the accidents which must have been foreseen and should have been provided for. Those concerned, notwithstanding the warnings they received, in their eagerness to realize the profits of a full cargo, took the hazards of the adventure and must now bear the consequences. If she could overstay the time limited for a short period she could for a long one. Whatever the excess of time, the principle involved is the same.

It is insisted for the claimants that according to the President's proclamation on the 19th of April, the Hiawatha was not liable to capture, until 'the commander of one of the blockading vessels' had 'duly warned' her, endorsed 'on her register the date and fact of such warning,' and she had again attempted 'to leave the blockaded port.' To this proposition there are several answers:

1st. There is no such provision in the proclamation of the 27th of April touching *the ports of Virginia.*|

p. 678 It simply announces that a blockade of those ports would be established.

2d. The proclamation of Commodore Pendergrast limits the warning to those who should approach the line of the blockade in ignorance of its existence. This action of the naval commander has not been disavowed by his Government, and is conclusive in a Prize Court. The warning proposed by this proclamation is according to the law of nations, and it is all that the law requires.

3d. If the provision referred to in the Proclamation of the 19th of April be applicable to the ports of Virginia, it must be considered in the light of the surrounding circumstances.

It was intended for the benefit of the innocent, not of the guilty. It would be absurd to warn parties who had full previous knowledge. According to the construction contended for, a vessel seeking to evade the blockade might approach and retreat any number of times, and when caught her captors could do nothing but warn her and endorse the warning upon her registry. The same process might be repeated at every port on the blockaded coast. Indeed, according to the literal terms of the proclamation, the Alabama might approach, and if captured, insist upon the warning and endorsement of her registry, and then upon her discharge. A construction drawing after it consequences so absurd, is a '*felo de se.*'

The cargo must share the fate of the vessel.

The decree below is affirmed with costs.

III. The case of the Brilliante, No. 134, presents but little difficulty. This was a Mexican vessel, with a cargo belonging to Mexican citizens, seized on the 23d of June, 1861, in Biloxi Bay, in an attempt to escape from New Orleans by running the blockade, which had been established there by an efficient force on the 15th of May preceding. She was carried by the captors to Key West, where she was libelled in the District Court of the United States for the Southern District of Florida, and condemned with her cargo as prize of war.

From the deposition of Don Rafael Preciat, who was part owner of the vessel and partner in the ownership of the cargo, | and also was on board p. 679
from the time she left her home port at Campeche until her capture, the following facts may be gathered.

In approaching New Orleans with a cargo from Sisal, she found the United States ship-of-war Brooklyn blockading the mouth of the Mississippi River at Pass a Loutre, and was by the officer of that vessel informed of the blockade and forbid to enter. The witness had a son at Spring Hill College, near Mobile, whom he desired to get away; and the Commander of the Brooklyn gave him a letter to the Commander of the Niagara, recommending that he should be permitted to land and get his son. On leaving the Brooklyn she started along the coast in the direction of the Niagara, but instead of seeking that vessel, she evaded her, and went to New Orleans by way of Lake Ponchartrain. At New Orleans she discharged her cargo and took in another, and in attempting to escape by the way she intended, was captured as already stated.

Some attempt has been made to excuse her entrance to New Orleans by showing that the crew refused to proceed towards Mobile; but this is immaterial, as her condemnation is not for her successful entrance, but for her unsuccessful attempt to escape.

It is also urged that she was entitled to warning at the time of her capture, by virtue of the provision in the President's proclamation establishing the blockade. But whatever may be the sound construction of that provision in reference to warning vessels in its application to vessels which had notice of the blockade, the question does not arise in this case; because, from the statement of the owner of the vessel himself, she was warned by the officer of the Brooklyn.

The fact that the vessel's register was not produced by either party to show a warning endorsed on it, can make no difference. It cannot be supposed that such endorsement on the ship's register is to be the only evidence of warning; for if this were admitted, the vessel would only have to destroy her register, and with it the only evidence in which she could be condemned, or she would only need to keep several registers and destroy the one having the endorsement.

p. 680 We entertain no doubt that this vessel and cargo were justly | condemned as neutral property for running the blockade, of which she had been fairly warned, and which she had once successfully violated.

The judgment is therefore affirmed.

The case of the Crenshaw, No. 163, on the other hand, presents the question of 'enemies' property,' pure and simple. This vessel was seized in Hampton Roads on the 17th of May, 1861, by the blockading force at that point under flag-officer Stringham, and was carried as a prize of war into New York. The vessel and the larger part of the cargo were, at the time of the capture, owned by citizens of the State of Virginia, residing in Richmond; and the vessel had on board, among her papers, a clearance signed on the 14th of May by R. H. Lortin, Collector of the Port of Richmond, of the Confederate States of America.

Upon the principles already settled, the vessel and such parts of her cargo as came within the description of enemies' property, were rightfully condemned. It is however claimed that ten tierces of tobacco strips shipped by Ludlam & Watson at Richmond, to be delivered to shipper's order at Liverpool, and thirty tierces of tobacco strips shipped by W. O. Clark at Richmond, to order of Messrs. Sam'l Irven or assigns, Liverpool, are not enemies' property, and should be restored to claimants.

The claim for the ten tierces, as interposed by Henry Ludlam in behalf of himself and others, and the statement of the claimant's petition, are sworn to by Gustave Henikin, who holds the bill of lading, which is endorsed—'deliver to Ludlam & Henikin, for Chas. Lear & Sons', Liverpool. Ludlam & Watson.'

Mr. Henikin states that his partner, Henry Ludlam, was in Europe, that Watson, (the partner of Ludlam & Watson, resident in Richmond,) was out of the jurisdiction of the Court, and that his knowledge of the facts embraced in the petition is derived from his connections with it as

partner of Ludlam, and from correspondence and business relations with the shippers. The extent of his knowledge thus set forth is not very satisfactory nor is the claim stated in a manner to relieve it of any embarrassment growing out of this fact. He sets forth substantially that Ludlam & Watson, the shippers, was a firm composed of | Henry Ludlam, p. 681
a citizen and resident of Rhode Island, and G. F. Watson, a citizen and resident of Richmond, Va., doing business in Richmond ; and that Henry Ludlam was also doing business in New York in partnership with Gustave Henikin, under the style of Ludlam & Henikin, and that Lear & Sons were a mercantile partnership, composed of British subjects, residing in Liverpool. Then, speaking in behalf of all these parties, the petitioner says, they are owners of the ten tierces of tobacco, and *bona fide* owners of the bill of lading for the same, and that said tobacco was from the time of the shipment on board of the Crenshaw in the Port of Richmond, and still is the property of the claimants.

It will be seen at once, that the statement does not profess to set out what are the distinct interests of each individual in this property, nor the separate interests of the three partnership firms thus claiming it. Nor is there any attempt to show how any person beside Ludlam & Watson of Richmond, who were the shippers, acquired any interest in it. It is a joint claim on the part of all the persons mentioned, all of whom are asserted to be *bona fide* holders of the bill of lading. It is perfectly consistent with all that was stated, that Ludlam & Watson were the real owners of the property. The bill of lading, which is to shipper's order or assigns, throws no light on the subject, and there is not a particle of other testimony in reference to the claim in the record. The Court decreed that the interest of Lear & Sons in the ten tierces of tobacco be restored to them and that they pay costs, unless they furnished further proof that the property was *bona fide* neutral. They failed to furnish better proof and appealed on account of the costs.

We are of the opinion that the decree does them no injustice, and in the doubtful circumstances in which this claim stands, on their own statement, should have had great hesitation in giving them the property if the captors had appealed.

In reference to the claim of Ludlam, we are not sufficiently advised of what it is by his pleading or by the proof, to set apart for him, if it were just. But we are of the opinion that the firm of Ludlam & Watson, doing business in Richmond, where | Watson, the active member of the p. 682
firm, resided, must be ruled by his status in reference to the property of the firm under his control in the enemy country.

The property was, through his residence in that country, subjected to the power of the enemy, and comes within the category of ' enemies' property.'

There is more difficulty in reference to the claim of Irvin & Co. to the thirty tierces of tobacco strips.

It very clearly appears that Irvin & Co., claimants, purchased this tobacco before the war broke out, with their own means, which were then in Richmond, and that they are citizens and residents of New York.

It is claimed that the property should be condemned on the ground that the transaction constitutes an illegal traffic with the enemy. This certainly cannot be held to apply to the purchase of the tobacco, which was bought and paid for before hostilities commenced. If it is intended to apply the principle of illegal traffic to the attempt to withdraw the property from the enemy country, it would seem that the order of the Secretary of the Navy allowing fifteen days for all vessels to withdraw from the blockaded ports, with or without cargo, should be held to apply to the property of one of our own citizens, residing in New York, already bought and paid for, as well as to any neutral cargo. If this be correct, it would seem that the property of Irvin & Co. should be restored to them as that of Laurie, Son & Co. was.

The right of Scott & Clarke to commissions on profits really constituted no interest in the property, and presents no cognizable feature in the case.

This property will therefore be restored to the claimants.

Mr. Justice NELSON, dissenting. The property in this case, vessel and cargo, was seized by a Government vessel on the 20th of May, 1861, in Hampton Roads, for an alleged violation of the blockade of the ports of the State of Virginia. The Hiawatha was a British vessel and the cargo belonged to British subjects. The vessel had entered the James River
p. 683 before the blockade, on | her way to City Point, upwards of one hundred miles from the mouth, where she took in her cargo. She finished loading on the 15th of May, but was delayed from departing on her outward voyage till the 17th for want of a tug to tow her down the river. She arrived at Hampton Roads on the 20th, where, the blockade in the meantime having been established, she was met by one of the ships and the boarding officer endorsed on her register, ' ordered not to enter any port in Virginia, or south of.' This occurred some three miles above the place where the flag ship was stationed, and the boarding officer directed the master to heave his ship to when he came abreast of the flag ship, which was done, when she was taken in charge as prize.

On the 30th April, flag officer Pendergrast, U. S. ship Cumberland, off Fortress Monroe, in Hampton Roads, gave the following notice: ' All vessels passing the capes of Virginia, coming from a distance and ignorant of the proclamation, (the proclamation of the President of the 27th of April that a blockade would be established,) will be warned off; and those passing Fortress Monroe will be required to anchor under the guns of the fort and subject themselves to an examination.'

The Hiawatha, while engaged in putting on board her cargo at City Point, became the subject of correspondence between the British Minister and the Secretary of State, under date of the 8th and 9th of May, which drew from the Secretary of the Navy a letter of the 9th, in which, after referring to the above notice of the flag officer Pendergrast, and stating that it had been sent to the Baltimore and Norfolk papers, and by one or more published, advised the Minister that fifteen days had been fixed as a limit for neutrals to leave the ports after an actual blockade had commenced, with or without cargo. The inquiry of the British Minister had referred not only to the time that a vessel would be allowed to depart, but whether it might be ladened within the time. This vessel, according to the advice of the Secretary, would be entitled to the whole of the 15th of May to leave City Point, her port of lading. As we have seen, her cargo was on board within the time, but the vessel was | delayed in p. 684
her departure for want of a tug to tow her down the river.

We think it very clear upon all the evidence that there was no intention on the part of the master to break the blockade, that the seizure under the circumstances was not warranted, and upon the merits that the ship and cargo should have been restored.

Another ground of objection to this seizure is, that the vessel was entitled to a warning endorsed on her papers by an officer of the blockading force, according to the terms of the proclamation of the President; and that she was not liable to capture except for the second attempt to leave the port.

The proclamation, after certain recitals, not material in this branch of the case, provides as follows: the President has 'deemed it advisable to set on foot a blockade of the ports within the States aforesaid, (the States referred to in the recitals,) in pursuance of the laws of the United States and of the law of nations, in such case made and provided.' 'If, therefore, with a view to violate such blockade, a vessel shall approach or shall attempt to leave either of said ports, she will be duly warned by the commander of one of the blockading vessels, who will endorse on her register the fact and date of such warning, and if the same vessel shall again attempt to enter or leave the blockaded port, she will be captured and sent to the nearest convenient port for such proceedings against her and her cargo, as prize, as may be deemed advisable.'

The proclamation of the President of the 27th of April extended that of the 19th to the States of Virginia and North Carolina.

It will be observed that this warning applies to vessels attempting to enter or leave the port, and is therefore applicable to the Hiawatha.

We must confess that we have not heard any satisfactory answer to the objection founded upon the terms of this proclamation.

It has been said that the proclamation, among other grounds, as stated

p. 685 on its face, is founded on the ' law of nations,' and | hence draws after it the law of blockade as found in that code, and that a warning is dispensed with in all cases where the vessel is chargeable with previous notice or knowledge that the port is blockaded. But the obvious answer to the suggestion is, that there is no necessary connection between the authority upon which the proclamation is issued and the terms prescribed as the condition of its penalties or enforcement, and, besides, if founded upon the law of nations, surely it was competent for the President to mitigate the rigors of that code and apply to neutrals the more lenient and friendly principles of international law. We do not doubt but that considerations of this character influenced the President in prescribing these favorable terms in respect to neutrals ; for, in his message a few months later to Congress, (4th of July,) he observes : ' a proclamation was issued for closing the ports of the insurrectionary districts ' (not by blockade, but) ' by proceedings *in the nature of a blockade.*'

This view of the proclamation seems to have been entertained by the Secretary of the Navy, under whose orders it was carried into execution. In his report to the President, 4th July, he observes, after referring to the necessity of interdicting commerce at those ports where the Government were not permitted to collect the revenue, that ' in the performance of this domestic municipal duty the property and interests of foreigners became, to some extent, involved in our home questions, and with a view of extending to them every comity that circumstances would justify, the rules of blockade were adopted, and, as far as practicable, made applicable to the cases that occurred under this embargo or non-intercourse of the insurgent States. The commanders, he observes, were directed to permit the vessels of foreigners to depart within fifteen days as in case of actual effective blockade, and their vessels were not to be seized unless they attempted, after having been once warned off, to enter an interdicted port in disregard of such warning.'

The question is not a new one in this Court. The British Government had notified the United States of the blockade of certain ports in the West Indies, but ' not to consider blockades as existing, unless in respect
p. 686 to particular ports which may be | actually invested, and, then, not to capture vessels bound to such ports, unless they shall have been previously warned not to enter them.'

The question arose upon this blockade in *Mar. In. Co.* vs. *Woods*, (6 Cranch, 29.)

Chief Justice Marshall, in delivering the opinion of the Court, observed, ' The words of the order are not satisfied by any previous notice which the vessel may have obtained, otherwise than by her being warned off. This is a technical term which is well understood. It is not satisfied by notice received in any other manner. The effect of this order is, that

a vessel cannot be placed in the situation of one having notice of the blockade until she is warned off. It gives her a right to inquire of the blockading squadron, if she shall not receive this warning from one capable of giving it, and, consequently, dispenses with her making that inquiry elsewhere. While this order was in force a neutral vessel might lawfully sail for a blockaded port, knowing it to be blockaded, and being found sailing towards such port, would not constitute an attempt to break the blockade until she should be warned off.'

We are of opinion, therefore, that, according to the very terms of the proclamation, neutral ships were entitled to a warning by one of the blockading squadron and could be lawfully seized only on the second attempt to enter or leave the port.

It is remarkable, also, that both the President and the Secretary, in referring to the blockade, treat the measure, not as a blockade under the law of nations, but as a restraint upon commerce at the interdicted ports under the municipal laws of the Government.

Another objection taken to the seizure of this vessel and cargo is, that there was no existing war between the United States and the States in insurrection within the meaning of the law of nations, which drew after it the consequences of a public or civil war. A contest by force between independent sovereign States is called a public war; and, when duly commenced by proclamation or otherwise, it entitles both of the belligerent parties to all the rights of war against each other, and as respects neutral nations. Chancellor Kent observes, 'Though a solemn declaration, or previous notice to the enemy, be now laid aside, it is essential that some formal public act, proceeding directly from the competent source, should announce to the people at home their new relations and duties growing out of a state of war, and which should equally apprize neutral nations of the fact, to enable them to conform their conduct to the rights belonging to the new state of things.' 'Such an official act operates from its date to legalize all hostile acts, in like manner as a treaty of peace operates from its date to annul them.' He further observes, 'as war cannot lawfully be commenced on the part of the United States without an act of Congress, such act is, of course, a formal notice to all the world, and equivalent to the most solemn declaration.' p. 687

The legal consequences resulting from a state of war between two countries at this day are well understood, and will be found described in every approved work on the subject of international law. The people of the two countries become immediately the enemies of each other—all intercourse commercial or otherwise between them unlawful—all contracts existing at the commencement of the war suspended, and all made during its existence utterly void. The insurance of enemies' property, the drawing of bills of exchange or purchase on the enemies' country, the remission

of bills or money to it are illegal and void. Existing partnerships between citizens or subjects of the two countries are dissolved, and, in fine, interdiction of trade and intercourse direct or indirect is absolute and complete by the mere force and effect of war itself. All the property of the people of the two countries on land or sea are subject to capture and confiscation by the adverse party as enemies' property, with certain qualifications as it respects property on land, (*Brown* vs. *United States*, 8 Cranch, 110,) all treaties between the belligerent parties are annulled. The ports of the respective countries may be blockaded, and letters of marque and reprisal granted as rights of war, and the law of prizes as defined by the law of nations comes into full and complete operation, resulting from maritime captures, *jure belli*. War also effects a change
p. 688 in the | mutual relations of all States or countries, not directly, as in the case of the belligerents, but immediately and indirectly, though they take no part in the contest, but remain neutral.

This great and pervading change in the existing condition of a country, and in the relations of all her citizens or subjects, external and internal, from a state of peace, is the immediate effect and result of a state of war : and hence the same code which has annexed to the existence of a war all these disturbing consequences has declared that the right of making war belongs exclusively to the supreme or sovereign power of the State.

This power in all civilized nations is regulated by the fundamental laws or municipal constitution of the country.

By our Constitution this power is lodged in Congress. Congress shall have power ' to declare war, grant letters of marque and reprisal, and make rules concerning captures on land and water.'

We have thus far been considering the status of the citizens or subjects of a country at the breaking out of a public war when recognized or declared by the competent power.

In the case of a rebellion or resistance of a portion of the people of a country against the established government, there is no doubt, if in its progress and enlargement the government thus sought to be overthrown sees fit, it may by the competent power recognize or declare the existence of a state of civil war, which will draw after it all the consequences and rights of war between the contending parties as in the case of a public war. Mr. Wheaton observes, speaking of civil war, ' But the general usage of nations regards such a war as entitling both the contending parties to all the rights of war as against each other, and even as respects neutral nations.' It is not to be denied, therefore, that if a civil war existed between that portion of the people in organized insurrection to overthrow this Government at the time this vessel and cargo were seized, and if she was guilty of a violation of the blockade, she would be lawful prize of war. But before this insurrection against the established Govern-

ment can be dealt with on the footing of a civil war, within the meaning of the law of nations and the Constitution | of the United States, and p. 689
which will draw after it belligerent rights, it must be recognized or declared by the war-making power of the Government. No power short of this can change the legal status of the Government or the relations of its citizens from that of peace to a state of war, or bring into existence all those duties and obligations of neutral third parties growing out of a state of war. The war power of the Government must be exercised before this changed condition of the Government and people and of neutral third parties can be admitted. There is no difference in this respect between a civil or a public war.

We have been more particular upon this branch of the case than would seem to be required, on account of any doubt or difficulties attending the subject in view of the approved works upon the law of nations or from the adjudication of the courts, but, because some confusion existed on the argument as to the definition of a war that drew after it all the rights of prize of war. Indeed, a great portion of the argument proceeded upon the ground that these rights could be called into operation—enemies' property captured—blockades set on foot and all the rights of war enforced in prize courts—by a species of war unknown to the law of nations and to the Constitution of the United States.

An idea seemed to be entertained that all that was necessary to constitute a war was organized hostility in the district of country in a state of rebellion—that conflicts on land and on sea—the taking of towns and capture of fleets—in fine, the magnitude and dimensions of the resistance against the Government—constituted war with all the belligerent rights belonging to civil war. With a view to enforce this idea, we had, during the argument, an imposing historical detail of the several measures adopted by the Confederate States to enable them to resist the authority of the general Government, and of many bold and daring acts of resistance and of conflict. It was said that war was to be ascertained by looking at the armies and navies or public force of the contending parties, and the battles lost and won—that in the language of one of the learned counsel, 'Whenever the situation of opposing hostilities has assumed the proportions | and pursued the methods of war, then peace is driven out, the p. 690
ordinary authority and administration of law are suspended, and war in fact and by necessity is the *status* of the nation until peace is restored and the laws resumed their dominion.'

Now, in one sense, no doubt this is war, and may be a war of the most extensive and threatening dimensions and effects, but it is a statement simply of its existence in a material sense, and has no relevancy or weight when the question is what constitutes war in a legal sense, in the sense of the law of nations, and of the Constitution of the United States? For

it must be a war in this sense to attach to it all the consequences that belong to belligerent rights. Instead, therefore, of inquiring after armies and navies, and victories lost and won, or organized rebellion against the general Government, the inquiry should be into the law of nations and into the municipal fundamental laws of the Government. For we find there that to constitute a civil war in the sense in which we are speaking, before it can exist, in contemplation of law, it must be recognized or declared by the sovereign power of the State, and which sovereign power by our Constitution is lodged in the Congress of the United States—civil war, therefore, under our system of government, can exist only by an act of Congress, which requires the assent of two of the great departments of the Government, the Executive and Legislative.

We have thus far been speaking of the war power under the Constitution of the United States, and as known and recognized by the law of nations. But we are asked, what would become of the peace and integrity of the Union in case of an insurrection at home or invasion from abroad if this power could not be exercised by the President in the recess of Congress, and until that body could be assembled ?

The framers of the Constitution fully comprehended this question, and provided for the contingency. Indeed, it would have been surprising if they had not, as a rebellion had occurred in the State of Massachusetts while the Convention was in session, and which had become so general
p. 691 that it was quelled only by | calling upon the military power of the State. The Constitution declares that Congress shall have power 'to provide for calling forth the militia to execute the laws of the Union, suppress insurrections, and repel invasions.' Another clause, 'that the President shall be Commander-in-chief of the Army and Navy of the United States, and of the militia of the several States when called into the actual service of the United States;' and, again, 'He shall take care that the laws shall be faithfully executed.' Congress passed laws on this subject in 1792 and 1795. 1 United States Laws, pp. 264, 424.

The last Act provided that whenever the United States shall be invaded or be in imminent danger of invasion from a foreign nation, it shall be lawful for the President to call forth such number of the militia most convenient to the place of danger, and in case of insurrection in any State against the Government thereof, it shall be lawful for the President, on the application of the Legislature of such State, if in session, or if not, of the Executive of the State, to call forth such number of militia of any other State or States as he may judge sufficient to suppress such insurrection.

The 2d section provides, that when the laws of the United States shall be opposed, or the execution obstructed in any State by combinations too powerful to be suppressed by the course of judicial proceedings, it

shall be lawful for the President to call forth the militia of such State, or of any other State or States as may be necessary to suppress such combinations ; and by the Act 3 March, 1807, (2 U. S. Laws, 443,) it is provided that in case of insurrection or obstruction of the laws, either in the United States or of any State or Territory, where it is lawful for the President to call for the militia for the purpose of suppressing such insurrection, and causing the laws to be executed, it shall be lawful to employ for the same purpose such part of the land and naval forces of the United States as shall be judged necessary.

It will be seen, therefore, that ample provision has been made under the Constitution and laws against any sudden and unexpected disturbance of the public peace from insurrection at home | or invasion from abroad. p. 692
The whole military and naval power of the country is put under the control of the President to meet the emergency. He may call out a force in proportion to its necessities, one regiment or fifty, one ship-of-war or any number at his discretion. If, like the insurrection in the State of Pennsylvania in 1793, the disturbance is confined to a small district of country, a few regiments of the militia may be sufficient to suppress it. If of the dimension of the present, when it first broke out, a much larger force would be required. But whatever its numbers, whether great or small, that may be required, ample provision is here made ; and whether great or small, the nature of the power is the same. It is the exercise of a power under the municipal laws of the country and not under the law of nations ; and, as we see, furnishes the most ample means of repelling attacks from abroad or suppressing disturbances at home until the assembling of Con gress, who can, if it be deemed necessary, bring into operation the war power, and thus change the nature and character of the contest. Then, instead of being carried on under the municipal law of 1795, it would be under the law of nations, and the Acts of Congress as war measures with all the rights of war.

It has been argued that the authority conferred on the President by the Act of 1795 invests him with the war power. But the obvious answer is, that it proceeds from a different clause in the Constitution and which is given for different purposes and objects, namely, to execute the laws and preserve the public order and tranquillity of the country in a time of peace by preventing or suppressing any public disorder or disturbance by foreign or domestic enemies. Certainly, if there is any force in this argument, then we are in a state of war with all the rights of war, and all the penal consequences attending it every time this power is exercised by calling out a military force to execute the laws or to suppress insurrection or rebellion ; for the nature of the power cannot depend upon the numbers called out. If so, what numbers will constitute war and what numbers will not ? It has also been argued that this power of the President

p. 693 from necessity should be construed as vesting him with the war | power, or the Republic might greatly suffer or be in danger from the attacks of the hostile party before the assembling of Congress. But we have seen that the whole military and naval force are in his hands under the municipal laws of the country. He can meet the adversary upon land and water with all the forces of the Government. The truth is, this idea of the existence of any necessity for clothing the President with the war power, under the Act of 1795, is simply a monstrous exaggeration ; for, besides having the command of the whole of the army and navy, Congress can be assembled within any thirty days, if the safety of the country requires that the war power shall be brought into operation.

The Acts of 1795 and 1807 did not, and could not under the Constitution, confer on the President the power of declaring war against a State of this Union, or of deciding that war existed, and upon that ground authorize the capture and confiscation of the property of every citizen of the State whenever it was found on the waters. The laws of war, whether the war be civil or *inter gentes*, as we have seen, convert every citizen of the hostile State into a public enemy, and treat him accordingly, whatever may have been his previous conduct. This great power over the business and property of the citizen is reserved to the legislative department by the express words of the Constitution. It cannot be delegated or surrendered to the Executive. Congress alone can determine whether war exists or should be declared ; and until they have acted, no citizen of the State can be punished in his person or property, unless he has committed some offence against a law of Congress passed before the act was committed, which made it a crime, and defined the punishment. The penalty of confiscation for the acts of others with which he had no concern cannot lawfully be inflicted.

In the breaking out of a rebellion against the established Government, the usage in all civilized countries, in its first stages, is to suppress it by confining the public forces and the operations of the Government against those in rebellion, and at the same time extending encouragement and support to the loyal people with a view to their co-operation in putting
p. 694 down the | insurgents. This course is not only the dictate of wisdom, but of justice. This was the practice of England in Monmouth's rebellion in the reign of James the Second, and in the rebellions of 1715 and 1745, by the Pretender and his son, and also in the beginning of the rebellion of the Thirteen Colonies of 1776. It is a personal war against the individuals engaged in resisting the authority of the Government. This was the character of the war of our Revolution till the passage of the Act of the Parliament of Great Britain of the 16th of George Third, 1776. By that act all trade and commerce with the Thirteen Colonies was interdicted and all ships and cargoes belonging to the inhabitants subjected to

forfeiture as if the same were the ships and effects of open enemies. From this time the war became a territorial civil war between the contending parties, with all the rights of war known to the law of nations. Down to this period the war was personal against the rebels, and encouragement and support constantly extended to the loyal subjects who adhered to their allegiance, and although the power to make war existed exclusively in the King, and of course this personal war carried on under his authority, and a partial exercise of the war power, no captures of the ships or cargo of the rebels as enemies' property on the sea, or confiscation in Prize Courts as rights of war, took place until after the passage of the Act of Parliament. Until the passage of the act the American subjects were not regarded as enemies in the sense of the law of nations. The distinction between the loyal and rebel subjects was constantly observed. That act provided for the capture and confiscation as prize of their property as if the same were the property ' of open enemies.' For the first time the distinction was obliterated.

So the war carried on by the President against the insurrectionary districts in the Southern States, as in the case of the King of Great Britain in the American Revolution, was a personal war against those in rebellion, and with encouragement and support of loyal citizens with a view to their co-operation and aid in suppressing the insurgents, with this difference, as the war-making power belonged to the King, he might have recognized or declared the war at the beginning to be a civil war, | which would draw p. 695
after it all the rights of a belligerent, but in the case of the President no such power existed : the war therefore from necessity was a personal war, until Congress assembled and acted upon this state of things.

Down to this period the only enemy recognized by the Government was the persons engaged in the rebellion, all others were peaceful citizens, entitled to all the privileges of citizens under the Constitution. Certainly it cannot rightfully be said that the President has the power to convert a loyal citizen into a belligerent enemy or confiscate his property as enemy's property.

Congress assembled on the call for an extra session the 4th of July, 1861, and among the first acts passed was one in which the President was authorized by proclamation to interdict all trade and intercourse between all the inhabitants of States in insurrection and the rest of the United States, subjecting vessel and cargo to capture and condemnation as prize, and also to direct the capture of any ship or vessel belonging in whole or in part to any inhabitant of a State whose inhabitants are declared by the proclamation to be in a state of insurrection, found at sea or in any part of the rest of the United States. Act of Congress of 13th of July, 1861, secs. 5, 6. The 4th section also authorized the President to close any port in a Collection District obstructed so that the revenue could not

be collected, and provided for the capture and condemnation of any vessel attempting to enter.

The President's Proclamation was issued on the 16th of August following, and embraced Georgia, North and South Carolina, part of Virginia, Tennessee, Alabama, Louisiana, Texas, Arkansas, Mississippi and Florida.

This Act of Congress, we think, recognized a state of civil war between the Government and the Confederate States, and made it territorial. The Act of Parliament of 1776, which converted the rebellion of the Colonies into a civil territorial war, resembles, in its leading features, the act to which we have referred. Government in recognizing or declaring the existence of a civil war between itself and a portion of the people in
p. 696 insurrection usually modifies its effects with a view as far as | practicable to favor the innocent and loyal citizens or subjects involved in the war. It is only the urgent necessities of the Government, arising from the magnitude of the resistance, that can excuse the conversion of the personal into a territorial war, and thus confound all distinction between guilt and innocence; hence the modification in the Act of Parliament declaring the territorial war.

It is found in the 44th section of the Act, which for the encouragement of well affected persons, and to afford speedy protection to those desirous of returning to their allegiance, provided for declaring such inhabitants of any colony, county, town, or place, at peace with his majesty, and after such notice by proclamation there should be no further captures. The Act of 13th of July provides that the President may, in his discretion, permit commercial intercourse with any such part of a State or section, the inhabitants of which are declared to be in a state of insurrection (§ 5), obviously intending to favor loyal citizens and encourage others to return to their loyalty. And the 8th section provides that the Secretary of the Treasury may mitigate or remit the forfeitures and penalties incurred under the act. The act of 31st July is also one of a kindred character. That appropriates $2,000,000 to be expended under the authority of the President in supplying and delivering arms and munitions of war to loyal citizens residing in any of the States of which the inhabitants are in rebellion, or in which it may be threatened. We agree, therefore, that the Act 13th July, 1861, recognized a state of civil war between the Government and the people of the States described in that proclamation.

The cases of the *United States* vs. *Palmer*, (3 Wh., 610); *Divina Pastora* (4 Ibid., 52), and that class of cases to be found in the reports are referred to as furnishing authority for the exercise of the war power claimed for the President in the present case. These cases hold that when the Government of the United States recognizes a state of civil war

to exist between a foreign nation and her colonies, but remaining itself neutral, the Courts are bound to consider as lawful all those acts which the new Government may direct against the enemy, and we | admit the p. 697
President who conducts the foreign relations of the Government may fitly recognize or refuse to do so, the existence of civil war in the foreign nation under the circumstances stated.

But this is a very different question from the one before us, which is whether the President can recognize or declare a civil war, under the Constitution, with all its belligerent rights, between his own Government and a portion of its citizens in a state of insurrection. That power, as we have seen, belongs to Congress. We agree when such a war is recognized or declared to exist by the war-making power, but not otherwise, it is the duty of the Courts to follow the decision of the political power of the Government.

The case of *Luther* vs. *Borden et al.*, (7 How., 45,) which arose out of the attempt of an assumed new government in the State to overthrow the old and established Government of Rhode Island by arms. The Legislature of the old Government had established martial law, and the Chief Justice in delivering the opinion of the Court observed, among other things, that ' if the Government of Rhode Island deemed the armed opposition so formidable and so ramified throughout the State as to require the use of its military force, and the declaration of martial law, we see no ground upon which this Court can question its authority. It was a state of war, and the established Government resorted to the rights and usages of war to maintain itself and overcome the unlawful opposition.'

But it is only necessary to say, that the term ' war ' must necessarily have been used here by the Chief Justice in its popular sense, and not as known to the law of nations, as the State of Rhode Island confessedly possessed no power under the Federal Constitution to declare war.

Congress on the 6th of August, 1862, passed an Act confirming all acts, proclamations, and orders of the President, after the 4th of March, 1861, respecting the army and navy, and legalizing them, so far as was competent for that body, and it has been suggested, but scarcely argued, that this legislation on the subject had the effect to bring into existence an *ex post facto* civil war with all the rights of capture and confiscation, *jure* | *belli*, from the date referred to. An *ex post facto* law is defined, when, p. 698
after an action, indifferent in itself, or lawful, is committed, the Legislature then, for the first time, declares it to have been a crime and inflicts punishment upon the person who committed it. The principle is sought to be applied in this case. Property of the citizen or foreign subject engaged in lawful trade at the time, and illegally captured, which must be taken as true if a confirmatory act be necessary, may be held and confiscated by subsequent legislation. In other words trade and commerce

authorized at the time by acts of Congress and treaties, may, by *ex post facto* legislation, be changed into illicit trade and commerce with all its penalties and forfeitures annexed and enforced. The instance of the seizure of the Dutch ships in 1803 by Great Britain before the war, and confiscation after the declaration of war, which is well known, is referred to as an authority. But there the ships were seized by the war power, the orders of the Government, the seizure being a partial exercise of that power, and which was soon after exercised in full.

The precedent is one which has not received the approbation of jurists, and is not to be followed. See W. B. Lawrence, 2d ed. Wheaton's Elements of Int. Law, pt. 4, ch. 1. sec. 11, and note. But, admitting its full weight, it affords no authority in the present case. Here the captures were without any Constitutional authority, and void ; and, on principle, no subsequent ratification could make them valid.

Upon the whole, after the most careful consideration of this case which the pressure of other duties has admitted, I am compelled to the conclusion that no civil war existed between this Government and the States in insurrection till recognized by the Act of Congress 13th of July, 1861 ; that the President does not possess the power under the Constitution to declare war or recognize its existence within the meaning of the law of nations, which carries with it belligerent rights, and thus change the country and all its citizens from a state of peace to a state of war ; that this power belongs exclusively to the Congress of the United States, and, consequently, that the President had no power to set on foot a
p. 699 blockade under the law of nations, and | that the capture of the vessel and cargo in this case, and in all cases before us in which the capture occurred before the 13th of July, 1861, for breach of blockade, or as enemies' property, are illegal and void, and that the decrees of condemnation should be reversed and the vessel and cargo restored.

Mr. Chief Justice TANEY, Mr. Justice CATRON and Mr. Justice CLIFFORD, concurred in the dissenting opinion of Mr. Justice Nelson.

United States v. Hallock.

(154 U.S. Reports, 537) 1864.

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE SOUTHERN DISTRICT OF FLORIDA.

No. 113. Submitted January 25, 1864.—Decided February 8, 1864.

A French vessel leaving France for New Orleans in May, 1861, with knowledge of the blockade, and obtaining full knowledge of the same at the Bahamas, continued its voyage and attempted to enter that port. *Held*, that it was subject to capture, and that so much of the cargo as belonged to citizens of New Orleans was subject to condemnation as enemy's property, and so much as belonged to citizens of New York to condemnation for illicit trading with the enemy.

THE case is stated in the opinion.

MR. JUSTICE GRIER delivered the opinion of the court.

The questions which affect the decisions of this case have all been before this court in the ' prize cases ' decided at last term, and reported in 2 Black, 665.

On the 7th of July, 1861, the bark Pilgrim was attempting to enter the port of New Orleans, but ran aground in the night near Pass à l'Outre and was captured by the blockading vessels of the United States.

She had left Bordeaux, in France, about the 8th of May, after the news of the blockade of the southern ports had reached that place, and the American Consul would give no more papers to vessels bound for southern ports. In passing the Bahamas she had full information of the blockade. The master persisted, however, to continue his voyage and attempt to enter the port of New Orleans, till arrested by the blockading ships.

The cargo was consigned to owners in New Orleans. Two-thirds | of the p. 538
vessel belonged to citizens of New Orleans, the other third to the master and another, citizens of New York and Connecticut. The cargo and two-thirds of the vessel were liable to confiscation as ' enemy's property,' and the remainder for illicit trading with the enemy.

The decree of the court below is therefore reversed, and record remitted with directions to enter a decree in conformity to this opinion.

Reversed.

Mr. Attorney General and *Mr. Charles Eames* for the appellants.

The Circassian.

(2 Wallace, 135) 1864.

1. A blockade may be made effectual by batteries on shore as well as by ships afloat; and, in case of an inland port, may be maintained by batteries commanding the river or inlet by which it may be approached, supported by a naval force sufficient to warn off innocent and capture offending vessels attempting to enter.
2. The occupation of a city by a blockading belligerent does not terminate a public blockade of it previously existing; the city itself being hostile, the opposing enemy in the neighborhood, and the occupation limited, recent, and subject to the vicissitudes of war. Still less does it terminate a blockade proclaimed and maintained not only against that city, but against the port and district commercially dependent upon it and blockaded by its blockade.
3. A public blockade, that is to say, a blockade regularly notified to neutral governments, and as such distinguished from a simple blockade or such as may be established by a naval officer acting on his own discretion, or under direction of his superiors, must, in the absence of clear proof of a discontinuance of it,

be presumed to continue until notification is given by the blockading government of such discontinuance.

4. A vessel sailing from a neutral port with intent to violate a blockade is liable to capture and condemnation as prize from the time of sailing; and the intent to violate the blockade is not disproved by evidence of a purpose to call at another neutral port, not reached at time of capture, with ulterior destination to the blockaded port.

5. Evidence of intent to violate blockade may be collected from bills of lading of cargo, from letters and papers found on board the captured vessel, from acts and words of the owners or hirers of the vessel and the shippers of the cargo and their agents, and from the spoliation of papers in apprehension of capture.

THE steamship Circassian, a merchant steamer under British colors, was captured with a valuable cargo by the United States steamer Somerset, for an attempted violation of the blockade established in pursuance of the proclamation of the President, dated 19th of April, 1861. Both vessel and cargo were condemned as lawful prize by the District Court for the Southern District of Florida; and the master, as representative of both, now brought the decree under the review of this court by appeal.

The capture was made on *the 4th of May*, 1862,—the date is important,—seven or eight miles off the northerly coast of Cuba, about half way
p. 136 between Matanzas and Havana, and | about thirty miles from Havana; the ship at the time ostensibly proceeding to Havana, then distant but two or three hours' sail. The main voyage was begun at Bordeaux. There she took a cargo,—no part of it contraband,—and was making her way to Havana when captured. Pearson & Co., of Hull, British subjects, were her ostensible owners. The cargo was shipped by various English and French subjects, and consigned to order. The bills of lading spoke of the ship as 'loading for the port of Havana *for orders;*' and the promise of the bills was to deliver the packages 'to the said port of Havana, *there to receive orders for the final destination of my said steamer*, and to deliver the same to Messrs. Brulatour & Co., or their order, he or they paying me freight in accordance *with the terms of my charter-party, which is to be considered the supreme law as regards the voyage of said steamer, the orders to be received for her and her final destination.*' The master swore positively that he did not know of any destination after Havana; nor did the *depositions* directly show an intention to break the blockade.

The evidence of this intent rested chiefly on papers found on the vessel when captured, and in the inference arising from the spoliation of others. Thus while on her way from Cardiffe to Bordeaux, the ship had been chartered by Pearson & Co. to one J. Soubry, of Paris, agent for merchants loading her; the charter-party containing a stipulation that she should proceed to Havre or Bordeaux as ordered, and then to

load from the factories of the said merchants a full cargo, and 'therewith proceed to Havana, Nassau, or Bermuda, as ordered on sailing, and thence to proceed to a port of America, and to run the blockade, IF SO ORDERED by the freighters.'

With this charter-party was the following :

Memorandum of affreightment.

Taken on freight of Mr. Bouvet, Jr., by order and for account of Mr. J. Soubry, on board of the British steamer Circassian, &c., bound to *Nassau, Bermuda,* or *Havana,* the quantity, &c. Mr. J. Soubry engages to execute the charter-party | of affreightment ; that is to say, p. 137
that the merchandise shall not be disembarked but at the port of New Orleans, *and to this effect he engages to force the blockade, for account and with authority of J. Soubry.*

LAIBERT, Neveu.

And on this was indorsed, by one P. Debordes, who was the ship's husband or agent at Bordeaux, these words :

BORDEAUX, 15 February, 1862.

Sent similar memorandum to the parties concerned.

P. DESBORDES.

So, too, Bouvet wrote his correspondents in New Orleans, as follows, the letter being found on the captured vessel :

BORDEAUX, 1st April, 1862.

MESSRS. BRULATOUR & Co., New Orleans :

Confirming my letter of the 29th ult., copy of which is annexed, I inclose herewith bills lading for 659 packages merchandise, and 92 small casks U. P. ; *also, copy of charter-party, and private memorandum, per Circassian,* in order that you may have no difficulty in settling the freight by that vessel.

The Circassian has engaged to force the blockade, but should she fail in doing so, you will act in this matter as you may deem best. I intrust this matter entirely to you.

Accept, gentlemen, my affectionate salutations.

E. BOUVET.

In addition to these papers, various private letters, mostly, of course, in French, from persons in Bordeaux to their correspondents at Havana and New Orleans, were found on the vessel. One of these spoke of the steamer as 'loading entirely with our products for *New Orleans,* where,

it is said, she has engaged to introduce them ; ' another describes her ' as arrived at Bordeaux, a month since, to take on board a fine cargo, with which *to force the blockade ;* ' a third, as ' a very fast sailer, loaded in our port for *New Orleans*, where she will proceed, after having touched
p. 138 at Havana ;' a fourth, | as 'about to *try to enter your Mississippi*, touching. previously, at Havana.' So others, with similar expressions. A British house of Belfast, sending a letter by her to Havana, ' takes it *for granted* that she will proceed with her freight to *New Orleans*.' A French one of Bordeaux had a different view as to her getting there. This one writes :

' We are going to have a British steamer here of a thousand tons cargo *for your port*. We shall ship nothing by her, because the affair has been badly managed. Instead of keeping it a secret, it has been announced in Paris, London, and Bordeaux. Of course, the American Government is well informed as to all its details ; and if the steamer ever enters New Orleans, it will be because the commanding officer of the blockading squadron shuts his eyes. If he does not, she *must* be captured.'

In addition to this evidence, it appeared that a package of letters, which were sent on board at Panillac, a small place at the mouth of the Gironde, after the Circassian had cleared from Bordeaux, and was setting off *to sea, were burned after the vessel hove to*, and before the officers of the Somerset came on board, at the time of capture.

So far with regard to evidence of intent to break the blockade. This case, however, presented a special feature.

The capture, as already noted, took place on the 4th of May, 1862 ; at which date the *city* of New Orleans, for whose *port* the libellants alleged that the vessel had been really about to run, was in possession, more or less defined and firm, of the United States. The history was thus :

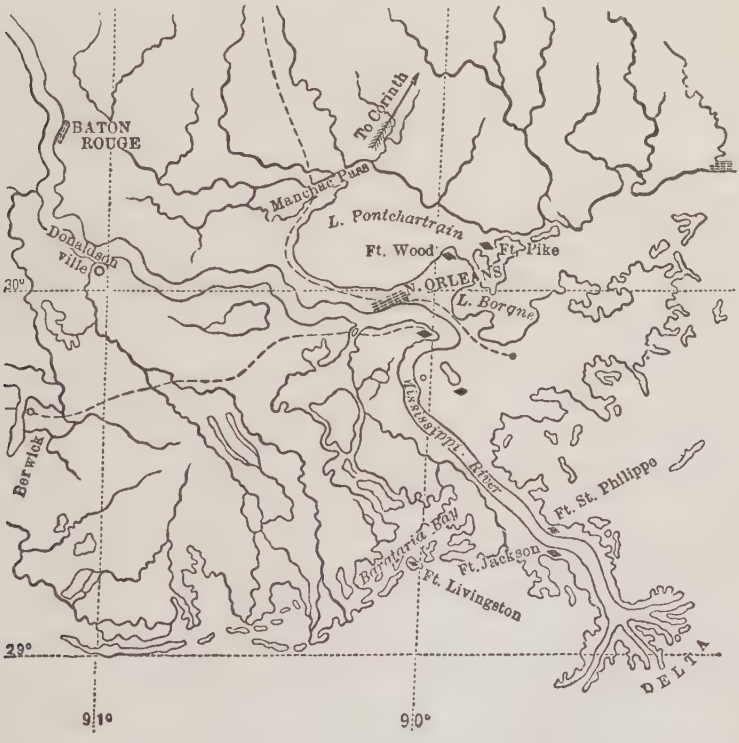
A fleet of the United States, under Commodore Farragut, having captured Forts Jackson and St. Philip on the 23d of April,[1] reached New Orleans on the 25th. On the 26th, the commodore demanded of the mayor the surrender of the city. The reply of the mayor was ' that the city was under martial law, and that he would consult General Lovell.' |
p. 139 The rebel Lovell declared, in turn, that ' he would surrender nothing ; but, at the same time, that he would retire, and leave the mayor unembarrassed. On the 26th, the flag-officer sent a letter, No. 2, to the mayor, in which he says :

' I came here to reduce New Orleans to obedience to the laws, and to vindicate the offended majesty of the Government. The rights of

[1] These forts were situated on opposite banks of the Mississippi River, about one-third of the way up to New Orleans from its mouths, and commanded the river approaches to the city. See chart, *infra*.

persons and property shall be secured. I therefore demand the unqualified surrender of the city, and that the emblem of sovereignty of the United States be hoisted upon the City Hall, Mint, and Custom House, by meridian of this day. And all emblems of sovereignty other than those of the United States must be removed from all public buildings from that hour.'

To this the mayor transmitted, on the same day, an answer, which he says 'is the *universal sense of my constituents*, no less than the prompting of my own heart.' After announcing that 'out of regard for the lives



of the women and children who crowd this metropolis,' General Lovell had evacuated it with his troops, and 'restored to *me* the custody of its power,' he continues:

'The city is without the means of defence. To surrender such a place were an idle and an unmeaning ceremony. The place is yours by the power of brutal force, not by any choice or consent of its inhabitants. *As to hoisting any flag other than the flag of our own adoption and allegiance, let me say to you that the man lives not in our midst whose hand and heart would not be paralyzed at the mere thought of such an act; nor can I find in my entire constituency so wretched and desperate a renegade as would dare to profane with his hand the sacred emblem of our aspirations.*

. . . *Your occupying the city does not transfer allegiance from the government of their choice to one which they have deliberately repudiated,* and they yield the obedience which the conqueror is entitled to extort from the conquered.'

At 6 A.M. of the 27th, the National flag was hoisted, under directions of Flag-officer Farragut, on the Mint, which building lay under the guns of the Government fleet; but at 10 A. M. of the same day an attempt to hoist it on the Custon House was abandoned; 'the excitement of the |
p. 140 crowd was so great that the mayor and councilmen thought that it would produce a conflict and cause great loss of life.'

On the 29th, General Butler reports that he finds the city under the dominion of the mob. 'They have insulted,' he says, 'our flag; torn it down with indignity. . . . I send a marked copy of a New Orleans paper containing an *applauding* account of the outrage.'

On the same day that General reported thus:

'The rebels have abandoned all their defensive works *in* and *around* New Orleans, including Forts Pike and Wood on Lake Pontchartrain, and Fort Livingston on Barataria Bay. They have retired in the direction of Corinth, beyond Manchac Pass, and abandoned everything in the river as far as Donaldsonville, some seventy miles beyond New Orleans.'|

p. 141 To the reader who does not recall these places in their relations to New Orleans, the diagram on the preceding page will present them.

A small body of Federal troops began to occupy New Orleans on the 1st of May. On the 2d, the landing was completed. The rebel mayor and council were not deposed. There was no armed resistance, but the city was bitterly disaffected, and was kept in order only by severe military discipline, and the rebel army was still organized and in the vicinity.[1]

[1] The state of things was thus described by the commanding general, at a later date, in justification of some severe measure adopted by him:

'We were two thousand five hundred men in a city seven miles long, by two to four wide, of a hundred and fifty thousand inhabitants, all hostile, bitter, defiant, explosive; standing, literally, on a magazine, a spark only needed for destruction.' (General Butler in New Orleans, by Parton, 342.)

In the record in this case, there was a copy of a proclamation by General Butler at New Orleans, *dated* May 1st, 1862, reciting that the city of New Orleans and its environs, with all its interior and exterior defences, had surrendered, and making known the purposes of the United States in thus taking possession, &c., and the rules and regulations by which the laws of the United States would, for the present, and *during the state of war,* be enforced and maintained. It appears (see *infra, The Venice*) that, though *dated* on the 1st, this paper was not published so early. The printing offices of the city were still under rebel management, and would not print it. The True Delta, the chief one, on the 2d, positively refused to do so, even as a handbill, no request having been ventured to have it printed in the columns of the paper. Some of General Butler's troops having been printers, half a dozen of them were sent to the office; and while a file of soldiers stood beside, a few copies were printed as a handbill, 'enough for the general's immediate purpose.' It did not appear in the paper till the 6th, and then with a defiant protest. (See Parton, 282.)

The blockade in question, as already mentioned, was declared by proclamation of President Lincoln in April, 1861; and was a blockade of the whole coast of the rebel States. No action to terminate it was taken by the Executive *until the 12th of May*, 1862, when, after the success of Flag-officer Farragut, the President issued a proclamation that the blockade of the port of New Orleans might be dispensed with, except as to contraband of war, *on and after July 1st following.* |

The case thus presented two principal questions : p. 142

1. Was the port of New Orleans, on the 4th of May, under blockade ?

2. If it was, was the Circassian, with a cargo destined to that place, then sailing with an intent to violate it ?

Supposing the cargo generally guilty, a minor question was, as to a particular part of it, asserted to have been shipped by Leech & Co., of Liverpool, British subjects, and of which a certain William Burrows was really, or in appearance, ' supercargo.'

Burrows himself swore—his own testimony being the only evidence on the subject—that he did not know of any charter-party for the voyage ; that *he received the bills of lading* (which, like all the bills, were in French) *from Messrs. Desbordes & Co., the ship's agents at Bordeaux ;* that he knew nothing about any papers relating to other portions of the cargo ; that he was going *to Havana to sell this merchandise, shipped by Leech, Harrison & Co.*, and was to return to Liverpool, either by the way of St. Thomas or New York ; that he knew of no instructions to break the blockade ; had heard nothing about the vessel's entering or breaking the blockade of any port, either before sailing or on the voyage, from any person as owner or agent, or connected with the vessel or cargo. No letters or other papers were found compromising this portion of the cargo other than as above stated.

The statutory port of New Orleans, as distinguished from the city of New Orleans itself, it may here be said, includes an extended region along the Mississippi above the city, parts of which were, at this date and afterwards, in complete possession of the rebels.

Messrs. A. F. Smith and Larocque, for the claimants of the ship and cargo :

I. A *blockade* is an interruption, by one belligerent, of communication, by any persons whatever, with a place occupied by another belligerent. No right exists in a belligerent, | as against a neutral, to blockade his own p. 143 ports. That would be war upon the neutral. Blockade is a right of war *against the enemy*, and affects the neutral only incidentally, and from the necessity of the case. It is a right burdensome to neutrals, and is strict in its character. It is one which is claimed by the belligerent and yielded by the neutral, so long, and only so long, as a blockade is maintained which is in accordance with and recognized by the law of nations.

The blockade of his own ports would be an embargo, an act of war against the neutral, thereby made and treated as an enemy. The embargo draws after it belligerent rights, and of a character entirely different from those that belong to a blockade; which are peaceful.

Now, was New Orleans, on the 4th of May, an enemy's port? Plainly not. *The United States* v. *Rice*,[1] in this court, some years since, is in point. In A. D. 1814, a place called Castine, on the south coast of the State of Maine, was captured by the British, then at war with us; and remained under the control of their military and naval forces until peace, in 1815. They established a custom-house under ordinary British laws. Certain goods were imported into the place during this interval; and, on the repossession of the place by the American Government, the question was, whether the goods were liable to duty under the laws of the United States. This court held that they were not. 'By the conquest and military occupation of Castine,' say the court, 'the enemy acquired that firm possession which enabled him to exercise the fullest rights of sovereignty over the place. The sovereignty of the United States was, of course, suspended, and the laws of the United States could no longer be rightfully enforced there, or be obligatory on the inhabitants, who remained and submitted to the conquerors. By the surrender, the inhabitants passed under a temporary allegiance to the British Government, and were bound by such laws, and such only, as *it* chose to recognize
p. 144 and impose.' Our case is stronger than this. In the case | just cited, the port was an American port, which fell under really foreign rule. This rule was an unnatural, exceptional, and temporary one. It was never regarded by any party as otherwise, or other than as an occupation during war, to be relinquished when peace should come. Great Britain, of course, never expected to hold permanently an isolated point in our country. With peace, the port was surrendered to us. Here, however, New Orleans had been seized by an insurrectionary faction only; *certain* Americans in temporary and mad revolt. We never ceased to regard New Orleans as a city of the United States. We never acknowledged her as belonging to any State but a State of this Union; a State then, as now, part of our one common country. In due time, and in a short time, the mob was brought, by the power of the Government, under its actual control, as the Government has always considered it to be under its constitutional right. The people were, at all times, American citizens; and at any moment, had they laid down their arms, these rights would have been conceded to them. With the suppression of the insurgent organization, law and order resumed the throne; the place became, in fact and in form, what it was always in law,—a port of the United States. Everything was remitted to its former condition.

[1] 4 Wheaton, 253.

The case is one where the fiction of postliminy happens to be a fact; the just and benignant fiction of the Roman law, *quæ fingit eum qui captus est in civitate semper fuisse.*

Very likely the presence of the Federal army was odious enough to both mob and gentry of New Orleans, to men and women alike, 'neutrals' and rebels as well. The population may have been all hostile, bitter, defiant, explosive. Still, the Federal army *did* keep its possession there, and with no other opposition than that of offensive words, gestures, and looks. Probably it was never in any danger; for if *it* had been insufficient, the Federal *fleet* lay beside the town, and could have destroyed it in a day. Here is the fact. From the hour that General Butler landed till this day, New Orleans has been under the Government control. | That the p. 145
fleet and army were not welcomed by the population with open hearts and arms, has nothing to do with the question.

The Government, then, was re-established, and everything was remitted. If this position be true, the right to capture was gone, no matter how guilty the design of the Circassian. 'When the blockade is raised, a veil is thrown over everything that has been done, and the vessel is no longer taken *in delicto*. The *delictum* may have been completed at one period, but it is, by subsequent events, entirely done away.'[1]

II. *As to intent to run the blockade,* the only evidence tending to show this is derived from the documents found on board; and from these, the following are the most unfavorable inferences for the vessel and cargo which could be drawn:

1st. By the charter-party, the vessel was to proceed 'to Havana, Nassau, or Bermuda, as ordered on sailing, and thence to proceed to a port of America, *and to run the blockade,* IF SO ORDERED BY FREIGHTERS.'

2d. By a paper found, signed 'Laibert, Neveu' (nephew), Laibert engages, on behalf of Soubry, that the merchandise should not be disembarked but at the port of New Orleans, and, to this effect, he engages to force the blockade for account and with authority of Soubry.

3d. The bills of lading contain an engagement by the master to convey the cargo to the port of Havana, there to 'receive orders for the final destination of the steamer, and there to deliver the same to ——, they paying freight in accordance with the terms of the charter-party, which was to be considered the supreme law as regarded the voyage, the orders to be received for her, and her final destination.'

4th. There are letters from *various shippers* to their correspondents in Havana and New Orleans, showing *their* belief that she was going to New Orleans.

This, we say, is all the evidence. Apart, therefore, from the memorandum signed 'Laibert, Neveu,' of the genuineness | of which and of whose p. 146

[1] The Lissett, 6 Robinson, 387, 395.

authority there is no proof, how does the case stand? The Circassian was not, at the time of capture, and never had been, *sailing to New Orleans*, nor indeed to any port contiguous thereto; Havana and New Orleans are distant 650 miles. Then the controlling document is the charter-party; and, according to that, the eventual running of the blockade was dependent upon an option to be exercised by the charterer *on arriving at Havana:* the bills of lading were expressly made subject to the charter-party. Her voyage was, therefore, to Havana *for orders*—by the terms of the charter-party—by her bills of lading—and by the fact. At Havana there was a '*locus penitentiæ.*' The *orders* might never be given. Indeed, it is quite certain they never would have been given under the change of circumstances by the capture of New Orleans.

Authority supports the view that this change of purpose, if effected at Havana, would avoid the capture.

In *The Imina*,[1] Sir William Scott decided, that where the vessel had originally sailed for Amsterdam, a blockaded port, under circumstances which would have subjected her to condemnation before changing her course; but the master, in consequence of information received at Elsinore, altered her destination, and proceeded towards Embden, she was not taken *in delicto* on a subsequent capture.

What difference exists between a guilty purpose forborne by the master, *without the knowledge of the owners*, and one not yet fully matured, but resting in contingency, merely, at the time of capture?

III. *As respects the portion of the cargo under the care of Burrows.* The evidence of this person, the supercargo, exculpates the owners, and the portion of the cargo owned by them, from all participation in even an intention to violate the blockade. The bills of lading were in French, which it does not appear that he understood. If he did, they, as do those for all the rest of the cargo, contain an express stipulation for the
p. 147 delivery of the goods to order, at Havana, on | payment of the freight, according to the charter-party; and the reference to the latter instrument would neither authorize the carrying of the goods beyond that port, nor was it of a nature to awaken any uneasiness on the part of a supercargo bound only thither.

Finally. An affirmance of the decree below will give the sanction of this great American court to the extravagant pretensions set up in times past by the British Courts of Admiralty, and will even go beyond them. The inducement to do this is, we admit, great at this moment. We are engaged in putting down a vast, awful, and wicked rebellion. We have had no countenance from the British Government, and have been actively and constantly thwarted by the cupidity and wealth of

[1] 3 Robinson, 138, Amer. ed.; 167, English ed.

British subjects. But the rebellion *will* be suppressed, and the United States will resume their natural and former place in the family of nations; the place of a great, upright, and enterprising neutral. '*Ita scriptum est.*' The nations of Europe will assume their places also; two of them the place of 'natural enemies' to each other; a third, the mighty empire of the North, taking a rank equal to either, with hostility to both. 'Let *us* not, with a short-sighted and foolish impatience, by snatching at a present and temporary advantage, sacrifice the permanent enjoyment of rights which we know not how soon we may require to exercise.' Let us adhere, at this trying time, in the judicial department, to the positions which we have so ably maintained in better times past —times soon to return—in the executive; and ratify, by solemn examples, the code which it is our interest, and the true interest of the world, to establish. Let us confirm afresh, and in a manner which none will gainsay, by our patience in war, the principles which we have found so necessary to our interests in peace. Let us earn, as self-controlled belligerents, the right to be great and prosperous neutrals. And then, when the hour of danger has passed,—as surely, if not shortly, it will pass,—we shall find that we have not, in order to suppress the outbreaks of insane revolt, made a sacrifice of the sources of | that wealth which p. 148
alone can make us either prosperous in peace or powerful in war.

Mr. Eames, contra, for the captors.

The CHIEF JUSTICE delivered the opinion of the court.

The Circassian, a merchant steamer, under British colors, was captured, on the 4th of May, 1862, by the United States war steamer Somerset, for attempted violation of the blockade, established in pursuance of the proclamation of the President, dated 19th of April, 1861.

The vessel and cargo having been condemned as lawful prize by the District Court of the United States for the Southern District of Florida, the master, as representative of both, has brought the decree under the review of this court by appeal.

That the rebellion against the national Government, which, in April, 1861, took the form of assault on Fort Sumter, had, before the end of July, assumed the character and proportions of civil war; and that the blockade, established under the President's proclamation, affected all neutral commerce, from that time, at least, with its obligations and liabilities, are propositions which, in this court, are no longer open to question. They were not more explicitly affirmed by the judges who concurred in the judgment pronounced in the prize cases at the December Term, 1862, than by the judges who dissented from it.

The Government of the United States, involved in civil war, claimed the right to close, against all commerce, its own ports seized by the rebels, as a just and proper exercise of power for the suppression of

attempted revolution. It insisted, and yet insists, that no one could justly complain if that power should be decisively and peremptorily exerted. In deference, however, to the views of the principal commercial nations, this right was waived, and a commercial blockade established. It was expected that this blockade, effectively maintained, would be scrupulously respected by nations and individuals who declared themselves neutral. |

p. 149 Of the various propositions asserted and controverted in the discussion of the cause now under consideration, two only need be examined in order to a correct understanding of its merits. It is insisted for the captors,

1. That on the 4th of May, 1862, the port of New Orleans was under blockade ;

2. That the Circassian, with a cargo destined for New Orleans, was then sailing with intent to violate that blockade, and therefore liable to capture as naval prize.

Both propositions are denied by the claimants. We shall consider them in their order.

First, then, was the port of New Orleans under blockade at the time of the capture ?

The city of New Orleans, and the forts commanding its approaches from the Gulf, were captured during the last days of April, 1862, and military possession of the city was taken on the 1st of May. Did this capture of the forts and military occupation of the city terminate the blockade of the port ?

The object of blockade is to destroy the commerce of the enemy, and cripple his resources by arresting the import of supplies and the export of products. It may be made effectual by batteries ashore as well as by ships afloat. In the case of an inland port, the most effective blockade would be maintained by batteries commanding the river or inlet by which it may be approached, supported by a naval force sufficient to warn off innocent, and capture offending vessels attempting to enter.

The capture of the forts, then, did not terminate the blockade of New Orleans, but, on the contrary, made it more complete and absolute.

Was it terminated by the military occupation of the city ?

The blockade of the ports of the insurgent States was declared from the first by the American Government to be a blockade of the whole coast, and so it has been understood by all governments. The blockade of New Orleans was a part of this general blockade. It applied not to

p. 150 the city alone, but controlled the port, which includes the whole | parish of Orleans, and lies on both sides of the Mississippi, and all the ports on that river and on the lakes east of the city.

Now, it may be well enough conceded that a continuous and complete possession of the city and the port, and of the approaches from the Gulf, would make a blockade unnecessary, and would supersede it. But, at the time of the capture of the Circassian, there had been no such possession. Only the city was occupied, not the port, much less the district of country commercially dependent upon it, and blockaded by its blockade. Even the city had been occupied only three days. It was yet hostile; the rebel army was in the neighborhood; the occupation, limited and recent, was subject to all the vicissitudes of war. Such an occupation could not at once, of itself, supersede or suspend the blockade. It might ripen into a possession which would have that effect, and it did; but at the time of the capture it operated only in aid and completion of the naval investment.

There is a distinction between simple and public blockades which supports this conclusion. A simple blockade may be established by a naval officer, acting upon his own discretion or under direction of superiors, without governmental notification; while a public blockade is not only established in fact, but is notified, by the government directing it, to other governments. In the case of a simple blockade, the captors are bound to prove its existence at the time of capture; while in the case of a public blockade, the claimants are held to proof of discontinuance in order to protect themselves from the penalties of attempted violation. The blockade of the rebel ports was and is of the latter sort. It was legally established and regularly notified by the American Government to the neutral governments. Of such a blockade, it was well observed by Sir William Scott: 'It must be conceived to exist till the revocation of it is actually notified.' The blockade of the rebel ports, therefore, must be presumed to have continued until notification of discontinuance.[1] |

It is, indeed, the duty of the belligerent government to give prompt notice; and if it fails to do so, proof of discontinuance may be otherwise made; but, subject to just responsibility to other nations, it must judge for itself when it can dispense with blockade. It must decide when the object of blockade, namely, prevention of commerce with enemies, can be attained by military force, or, when the enemies are rebels, by military force and municipal law, without the aid of a blockading force. The Government of the United States acted on these views. Upon advice of the capture of New Orleans, it decided that the blockade of the port might be safely dispensed with, except as to contraband of war, from and after the 1st of June. The President, therefore, on the 12th of May, issued his proclamation to that effect, and its terms were undoubtedly notified to neutral powers. This action of the Government must, p. 151

[1] The Betsey, Goodhue, Master, 1 Robinson, 282; The Neptune, 1 Id. 144.

under the circumstances of this case, be held to be conclusive evidence that the blockade of New Orleans was not terminated by military occupation on the 4th of May. New Orleans, therefore, was under blockade when the Circassian was captured.

It remains to be considered whether the ship and cargo were then liable to capture as prize for attempted violation of that blockade.

It is a well-established principle of prize law, as administered by the courts, both of the United States and Great Britain, that sailing from a neutral port with intent to enter a blockaded port, and with knowledge of the existence of the blockade, subjects the vessel and, in most cases, its cargo to capture and condemnation.[1] We are entirely satisfied with this rule. It was established, with some hesitation, when sailing vessels were the only vehicles of ocean commerce; but now, when steam and electricity have made all nations neighbors, and blockade running from
p. 152 neutral ports seems to have been organized as a business, | and almost raised to a profession, it is clearly seen to be indispensable to the efficient exercise of belligerent rights. It is not likely to be abandoned until the nations, by treaty, shall consent to abolish capture of private property on the seas, and with it the whole law and practice of commercial blockade.

Do the Circassian and her cargo come within this rule?

The Circassian was chartered at Paris on the 11th of February, 1862, by Z. C. Pearson & Co. to J. Soubry, agent, and the charter-party contained a stipulation that she should proceed to Havre or Bordeaux, and, being loaded, proceed thence with her cargo to Havana, Nassau, or Bermuda, and thence to a port in America and 'run the blockade, if so ordered by the freighters.' With this charter-party was found on the ship, at the time of capture, a memorandum of affreightment given to Bouvet, one of the shippers, and signed 'For account and with authority of J. Soubry,—Laibert, Neveu,' and containing this engagement: 'Mr. J. Soubry engages to execute the charter-party of affreightment; that is to say, that the merchandise shall not be disembarked except at New Orleans, and to this effect he engages to force the blockade.' With this paper was the following note, signed 'P. Desbordes:' 'Sent similar memorandum to the parties concerned.' This P. Desbordes was the ship's husband or agent at Bordeaux.

It is urged, on behalf of the claimants, that there is no evidence that Laibert had authority to act for Soubry; but the fact that the paper was found on the ship raises a presumption that he had that authority, and puts the burden of proof to the contrary on the claimants. Besides, it appears, from a letter written by Bouvet, that he forwarded by the

[1] Yeaton *v.* Fry, 5 Cranch, 335; Kent's Commentaries, 150; The Frederick Molke, 1 Robinson, 72; The Columbia, 1 Id. 130; The Neptune, 2 Id. 94.

ship, inclosed with this letter, the bills of lading of the goods shipped by him, and also ' a copy of the charter-party and *private memorandum.*' It can hardly be doubted that the copy of the charter-party in the record is this copy forwarded by Bouvet, or that the memorandum found with it is the *private* memorandum of which he writes. The circumstance that a similar memorandum was sent to the parties concerned | raises an almost irresistible presumption that the other freighters p. 153 shipped their merchandise under the same express stipulation to force the blockade.

It is hardly necessary to go further on the question of intent ; but if doubt remained, it would be dispelled by an examination of the other papers and facts in the case. Every bill of lading contained a stipulation for the conveyance of goods described in it to Havana, in order to receive orders as to their ulterior destination, and for their delivery at that destination on payment of freight. Such, we think, is the true import of each bill before us. Almost every letter found on board the ship and contained in the record, affords evidence of intent to force the blockade. These letters were written, at Bordeaux, to correspondents at Havana and New Orleans, and speak of the steamer as ' loaded entirely with our products for New Orleans ; ' as ' arrived hither a month since, to convey to your place, New Orleans, by forcing the blockade, a very fine cargo ; ' as ' loaded in our port for New Orleans, whither she will proceed after touching at Havana ; ' as ' being a very fast sailer ; ' as ' going to attempt the entrance of your river, after previously touching at Havana ; ' as ' bound to your port, New Orleans ; ' as ' bound from Bordeaux to New Orleans ; ' and as ' having engaged to force the blockade.' Most of these letters were written by shippers, and relate to merchandise described in one or another of the bills of lading. Finally, it is proved that on the eve, and almost at the moment, of capture, the captain ordered the destruction of a package of letters put on board the ship, after she had cleared from Bordeaux, at Panillac, a town on the Gironde, nearer the sea. These letters, doubtless, related to the ship, the cargo, or the voyage, probably to all. Their destruction would be a strong circumstance against the ship and cargo, were the other facts less convincing ; taken in connection with them, it irresistibly compels belief of guilty intent at the time of sailing and time of capture.

It was urged in argument that the ship was bound primarily to Havana, and might discharge her cargo there, and | should not be held p. 154 liable to capture for an intent which would have been abandoned on her arrival at that place.

We agree, that if the ship had been going to Havana with an honest intent to ascertain whether the blockade of New Orleans yet remained in force, and with no design to proceed further if such should prove to

be the case, neither ship nor cargo would have been subject to lawful seizure. But it is manifest that such was not the intent. The existence of the blockade was known at the inception of the voyage, and its discontinuance was not expected. The vessel was chartered and her cargo shipped with the purpose of forcing the blockade. The destination to Havana was merely colorable. It proves nothing beyond a mere purpose to touch at that port, perhaps, and, probably, with the expectation of getting information which would facilitate the success of the unlawful undertaking. It is quite possible that Havana, under the circumstances, would have turned out to be, as was insisted in argument, a *locus penitentiæ;* but a place for repentance does not prove repentance before the place is reached. It is quite possible that the news which would have met the vessel at Havana would have induced the master and shippers to abandon their design to force the blockade by ascending the Mississippi; but future possibilities cannot change present conditions. Nor is it at all certain that the purpose to break the blockade would have been abandoned. On the contrary, it is quite possible that the 'ulterior destination' mentioned in the bills of lading would have been changed to some other blockaded port. But this is not important. Neither possibilities nor probabilities could change the actual intention one way or another. At the time of capture, ship and cargo were on their way to New Orleans, under contract that the cargo should be discharged there and not elsewhere, and that the blockade should be forced in order to the fulfilment of that contract. This condition made ship and cargo then and there lawful prize.

There was some attempt, in argument, to distinguish that portion
p. 155 of the cargo shipped by William Burrows from the | remainder. We do not think it can be so distinguished. The bill of lading of the goods shipped by him is expressed in the same terms as the bills of goods shipped by others, and Burrows himself states that he received it from P. Desbordes & Co.,—the same Desbordes who sent 'to the other parties' memorandums similar to that which was given to Bouvet, and which stipulated for breach of blockade. There is no indication in the bill of lading that any one except Burrows had any interest in these goods, and no testimony except his own to that effect. Against the strong circumstances which tend to prove that they were in equal fault with all the rest, his not very unequivocal statement, that they were destined for sale in Havana, cannot prevail.

The decree of the District Court, condemning the vessel and cargo as lawful prize, must be

AFFIRMED.

Mr. Justice NELSON, dissenting:

I am unable to concur in the judgment of the court in this case;

and shall proceed to state briefly the grounds of my dissent, without entering upon the argument or discussion in support of them.

I think the proof sufficient to show, that the purpose of the master was to break the blockade of the port of New Orleans, and that it existed from the inception of the voyage: but, in my judgment, the defect in the case, on the part of the captors, is that no blockade existed at the port of New Orleans at the time the seizure was made. The city was reduced to possession by the naval forces of the United States, on the 25th of April preceding the seizure, and Forts Jackson and St. Philip on the 23d of the same month. They were situated on the opposite banks of the Mississippi River, about one-third of the way up to the city from its mouth. Admiral Farragut announced to the Government the capture and possession of the city on the day it took place, 25th of April, and General Butler, of the capture of the forts on the 29th. The latter announced, that the enemy had abandoned all their defensive works in and around New Orleans, including Forts Pike and Wood, on Lake Pontchartrain, | and Fort Livingston on Barataria Bay; and had p. 156
abandoned everything up the river as far as Donaldsville, some seventy miles beyond New Orleans. The authority of the Government of the United States had been restored over the city and its inhabitants; and over the Mississippi River, and both of its banks and the inlets to the same, from the ocean or gulf, including, also, the passage for vessels by the way of Lakes Borgne and Pontchartrain, the usual channel for vessels engaged in the coasting trade to and from New Orleans. And on the 1st of May, General Butler announced by proclamation, that the city of New Orleans and its environs, with all its interior and exterior defences, having surrendered to the combined land and naval forces of the United States, and being now in the occupation of these forces, the Major-General commanding hereby proclaims the objects and purposes of the United States in thus taking possession, &c., and the rules and regulations by which the laws of the United States would be, for the present, and during the state of war, enforced and maintained. The seizure of the vessel and cargo was made between Matanzas and Havana, on the 4th of May, several days after the city and port of New Orleans were reduced, and full authority of the United States extended and held over them.

A blockade under the law of nations is a belligerent right, and its establishment an act of war upon the nation whose port is blockaded. One of the most important of the belligerent rights is that of blockading the enemy's ports, not merely to compel the surrender of the place actually attacked or invested, but, as a means, often the most effectual, of compelling the enemy, by the pressure upon his financial and commercial resources, to listen to terms of peace. The object of a blockade, says

Chancellor Kent, is not merely to prevent the importation of supplies, but to prevent export as well as import, and to cut off all communication of commerce with the blockaded port.

Now, the capture and possession of the port of the enemy by the blockading force, or by the forces of the belligerent, in the course of the
p. 157 prosecution of the war, puts an end to | the blockade and all the penal consequences growing out of this measure to neutral commerce. The altered condition of things, and state of the war between the two parties in respect to the besieged port or town, makes the continuance of the blockade inconsistent with the code of international law on the subject; as no right exists on the part of the belligerent as against the neutral powers to blockade his own ports. This principle was recognized and applied by Sir W. Scott in the case of *The Trende Sostre*, decided in 1807.[1] She was a Danish vessel and was on a voyage to the Cape of Good Hope, then the port of an enemy, with contraband articles on board, and was seized as a prize of war; but the vessel had arrived at the Cape after that settlement had surrendered to the British forces. The counsel for the captors insisted, that though the settlement had become British, the penalty would not be defeated, as the intention and the act continued the same; that there was no case in which such a distinction had been allowed on the question of contraband. 'The distinction,' it was remarked, 'which had been admitted in blockade cases, stood altogether on particular grounds, as arising out of a class of cases depending on the blockade of neutral ports, in which the court had expressed a disposition to admit all favorable distinctions.' The court, in delivering its opinion, observes: 'If the port had continued Dutch, a person could not have been at liberty to carry thither articles of a contraband nature, under an intention of selling other innocent commodities only, and of proceeding with the contraband articles to a port of ulterior destination. But before the ship arrives, a circumstance takes place which completely discharges the whole of the guilt. Because, from the moment when the Cape became a British possession, the goods lost their nature of contraband. They were going into the possession of a British settlement; and the consequence of any pre-emption that could be put upon them, would be British pre-emption.' The court also observed: 'It has been
p. 158 said, that this is a | principle which the court has not applied to cases of contraband; and that the court, in applying it to cases of blockade, did it only in consideration of the particular hardships consequent on that class of cases. But I am not aware of any material distinction; because the principle on which the court proceeded was, that there must be a *delictum* existing at the moment of the seizure to sustain the penalty.' 'I am of opinion, therefore,' the judge says, in conclusion,

[1] 6 Robinson, 390, n.

'that the same rule does apply to cases of contraband, and upon the same principle on which it has been applied in those of blockade.' See also the case of *The Lisette*,[1] and of *The Abby*,[2] in which the same principle is declared, and one of them a case of blockade.

The cessation of the blockade necessarily resulted from the capture and possession of the port and town of New Orleans. They no longer belonged to the enemy, nor were under its dominion, but were a port and town of the United States. They had become emphatically so, for the capture was not that of the territory of a foreign nation to which we had obtained only the right and title of a conqueror; but the conquest was over our own territory, and over our own people, who had by illegal combinations, and mere force and violence, subverted the laws and usurped the authority of the General Government. The capture was but the restoration of the ancient possession, authority, and laws of the country, the continuance and permanency of which, so far as the right is involved, depend not on conquest, nor on the success or vicissitudes of armies; but upon the Constitution of the United States, which extends over every portion of the Union, and is the supreme law of the land. The doubt, therefore, that arose in the case of the *Thirty Hogsheads of Sugar* v. *Boyle*,[3] and which was solved by Chief Justice Marshall, and related to the case of a foreign conquest, cannot arise in this case. The Chief Justice observed, 'Some doubt has been suggested whether Santa Cruz, while in possession of Great Britain, could properly be considered a British | island. But for this doubt there can be no foundation. Although p. 159
acquisitions made during war are not considered permanent until confirmed by treaty; yet, to every commercial and belligerent purpose they are considered as part of the domain of the conqueror, so long as he retains the possession and government of them. The Island of Santa Cruz, after the capitulation, remained a British island until it was restored to Denmark.' Now, as we have seen, it is not necessary to invoke this doctrine in a case where the capture is of territory previously belonging to the sovereign power acquiring it, and which is retaken and held under the organic law and authority of that power.

I have said, that the cessation of the blockade in question resulted from the capture and repossession of the port and town of New Orleans, and that there was no longer an enemy's port or town to be blockaded. In addition to this, the moment the capture took place, and the authority of the United States was established, the municipal laws of that government took the place of the international law upon which the blockade rested. The reason for its continuance no longer existed: it had accomplished its object as one of the coercive measures against the enemy to compel a surrender. So far as intercourse with the town became

[1] 6 Robinson, 387. [2] 5 Id. 251. [3] 9 Cranch, 191.

material, whether commercial or otherwise, after the capture and possession, it was subject to regulation by the municipal laws, and which is much more efficient and absolute and less expensive than the measure of blockade. It is true, these laws cannot operate extra-territorially; but within the limit of the jurisdiction, and which extends to a marine league from the coast, their control over all intercourse with the port or town is complete. Seizures of neutral vessels and cargo on the high seas are, indeed, not admissible, but blockades are not established for the purpose of these seizures; they are but incidental to the exercise of the belligerent right against the port of the enemy.

The proclamation of the President of the 12th of May, 1862, which announces that the blockade of the port of New Orleans shall cease
p. 160 after the 1st of June following, has been | referred to as evidence of its continuance to that period. But I think it will be difficult to maintain the position upon any principle of international law, that the belligerent may continue a blockading force at the port after it has not only ceased to be an enemy's, but has become a port of its own. It is not necessary that the belligerent should give notice of the capture of the town, in order to put in operation the municipal laws of the place against neutrals. The act is a public event of which foreign nations are bound to take notice, and conform their intercourse to the local laws. The same principle applies to the blockade, and the effect of the capture of the port upon it. The event is public and notorious, and the effect and consequences of the change in the state of war upon the blockading force well understood.

I have felt it a duty to state the grounds of my dissent in this case, not on account of the amount of property involved, though that is considerable, or from any particular interests connected with the case, but from a conviction that there is a tendency, on the part of the belligerent, to press the right of blockade beyond its proper limits, and thereby unwittingly aid in the establishment of rules that are often found inconvenient, and felt as a hardship, when, in the course of events, the belligerent has become a neutral. I think the application of the law of blockade, in the present case, is a step in that direction, and am, therefore unwilling to give it my concurrence.

[See *infra, The Venice;* a case, in some senses, suppletory or complemental to the present one.]

The Venice.

(2 Wallace, 258) 1864.

1. The military occupation of the city of New Orleans by the forces of the United States, after the dispossession of the rebels from that immediate region in May, 1862, may be considered as having been substantially complete from the publication of General Butler's proclamation of the 6*th* (dated on the 1*st*) of that month; and all the rights and obligations resulting from such occupation, or from the terms of the proclamation, existed from the date of that publication.
2. This proclamation, in announcing, as it did, that 'all rights of property' would be held 'inviolate, subject only to the laws of the United | States;' and that p. 259
'all foreigners not naturalized, claiming allegiance to their respective governments, and not having made oath of allegiance to the government of the Confederate States,' would be 'protected in their persons and property as heretofore under the laws of the United States,' did but reiterate the rules established by the legislative and executive action of the national Government, and which may also be inferred from the policy of the war, in respect to the portions of the States in insurrection occupied and controlled by the troops of the Union. It was the manifestation of a general purpose, which seeks the re-establishment of the national authority, and the ultimate restoration of States and citizens to their national relations under better forms and firmer guarantees, without any view of subjugation by conquest.
3. Substantial, complete, and permanent military occupation and control, as distinguished from one that is illusory, imperfect, and transitory, works the exception made in the act of July 13th, 1861 (§ 5), which excepts from the rebellious condition those parts of rebellious States 'from time to time occupied and controlled by forces of the United States engaged in the dispersion of the insurgents;' and such military occupation draws after it the full measure of protection to persons and property consistent with a necessary subjection to military government.
4. The President's proclamation of 31st of March, 1863, affected in no respect the general principles of protection to rights and property under temporary government, established after the restoration of national authority.
5. Vessels and their cargoes belonging to citizens of New Orleans, or neutrals residing there and not affected by any attempts to run the blockade, or by any act of hostility against the United States, were protected after the publication of General Butler's proclamation, dated May 1st, 1862, and published on the 6th; though such persons, by being identified by long voluntary residence and by relations of active business with the enemy, may have themselves been 'enemies' within the meaning of the expression as used in public law.

THE schooner Venice, with a cargo of cotton, was captured in Lake Pontchartrain, Louisiana, by the United States ship-of-war Calhoun, on the 15th of May, 1862; was taken to Key West, libelled as a prize of war in the District Court, but was restored, with her cargo, to the claimant, Cooke, by its decree. The United States appealed.

The case, as appearing from the proofs,[1] and from the public history of the country, was in substance thus: |

[1] These consisted of the papers found on board at the time of capture, the depositions of the master and of the claimant, taken on the standing interrogatories, and a special affidavit.

p. 260 The claimant, Cooke, was a native British subject, and had resided, and been engaged in business, in New Orleans, without being naturalized as a citizen of the United States, for nearly ten years previously to the capture. About the 1st of April, 1862, he purchased, in the interior of the State of Mississippi, two hundred and five bales of cotton. This cotton, as he alleged, was bought as an investment for 'Confederate notes,' which he had become possessed of in previous employments in New Orleans; his intention being to let the cotton remain in the interior, away from the seaboard, until the rebellion should be over, and the cotton could be shipped and sold for gold or its equivalent. To prevent the threatened destruction of it under rebel order in Mississippi, he shipped it to New Orleans, where it arrived about the 7th of April. The same danger awaited it there. General Lovell, the rebel commanding general, gave him notice that his cotton must be immediately removed, or prepared for complete destruction in the event of the capture of the city. The schooner Venice was then lying near New Orleans, in the basin of the Pontchartrain Canal. This vessel the claimant purchased from her New Orleans owner, and about the 12th of April stowed the cotton, purchased as above stated, on board of her, together with twenty other bales of the same article, which were purchased in New Orleans, and put on board to complete the lading of the vessel, in order that it might be out of danger of burning in case of the capture of New Orleans by the United States forces. After being thus loaded, the Venice, on the 17th April, was towed out into Lake Pontchartrain.

During all this time, New Orleans and the surrounding region was in open rebellion and war against the United States, and the port of New Orleans and Lake Pontchartrain under blockade.

The Venice remained at anchor in the lake from the time she was taken there, April 17th, 1862, till her capture, on May 15th, 1862, being unfit for service; and though undergoing repairs, having had no intention of breaking the blockade. |

p. 261 Between these two dates, however, important naval and military events took place at New Orleans. The Government fleet, under Flag-officer Farragut, reached New Orleans on the 25th April; and on the 26th, the flag-officer sent one of his commanders to demand of the mayor the surrender of the city. The reply of the mayor was 'that the city was under martial law, and that he would consult General Lovell.' General Lovell declared in turn that 'he would surrender nothing,' but at the same time that he would retire and leave the mayor unembarrassed. On the 26th, the flag-officer sent a letter, No. 2, to the mayor, in which he says:

'I came here to reduce New Orleans to obedience to the laws, and to vindicate the offended majesty of the Government. The rights of

persons and property shall be secured. I therefore demand the unqualified surrender of the city, and that the emblem of sovereignty of the United States be hoisted upon the City Hall, Mint, and Custom House, by meridian of this day. And all emblems of sovereignty other than those of the United States must be removed from all public buildings from that hour.'

To this the mayor transmitted, on the same day, an answer, which he says 'is the *universal sense of my constituents*, no less than the prompting of my own heart.' After announcing that 'out of regard for the lives of the women and children who crowd this metropolis,' General Lovell had evacuated it with his troops, and 'restored to *me* the custody of its power,' he continues:

'The city is without the means of defence. To surrender such a place were an idle and an unmeaning ceremony. The place is yours by the power of brutal force, not by any choice or consent of its inhabitants. *As to hoisting any flag other than the flag of our own adoption and allegiance, let me say to you that the man lives not in our midst whose hand and heart would not be paralyzed at the mere thought of such an act; nor can I find in my entire constituency so wretched and desperate a renegade as would dare to profane with his hand the sacred emblem of our aspirations. . . . Your occupying the city does not transfer allegiance from the government of their choice to one which they have deliberately repudiated*, and they yield the obedience which the conqueror is entitled to extort from the conquered.' p. 262

At 6 A.M. of the 27th, the National flag was hoisted, under directions of Flag-officer Farragut, on the Mint, which building lay under the guns of the Government fleet; but at 10 A.M. of the same day an attempt to hoist it on the Custom House was abandoned; 'the excitement of the crowd was so great that the mayor and councilmen thought that it would produce a conflict and cause great loss of life.'

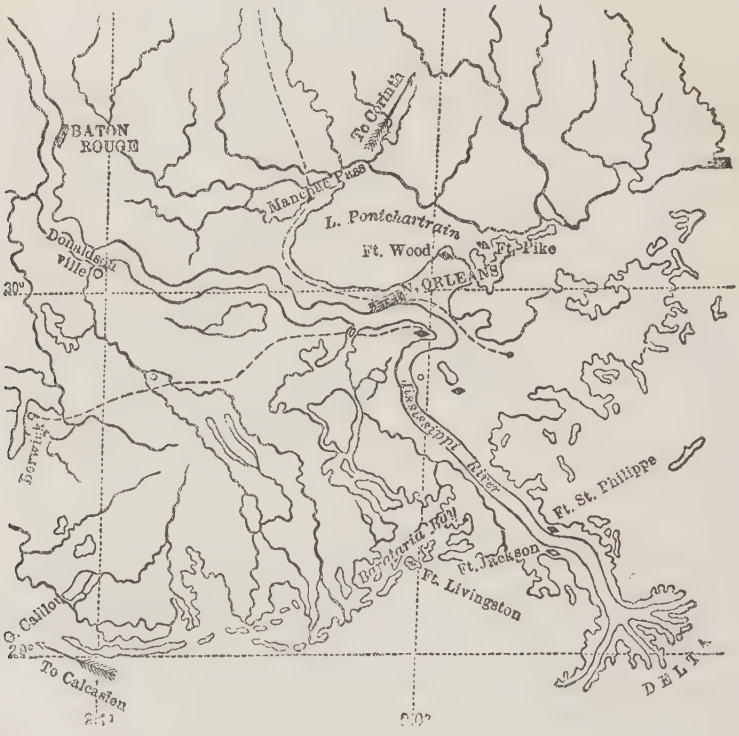
On the 29th, General Butler reports that he finds the city under the dominion of the mob. 'They have insulted,' he says, 'our flag; torn it down with indignity. . . . . I send a marked copy of a New Orleans paper containing an *applauding* account of the outrage.'

On the same day that General reported thus:

'The rebels have abandoned all their defensive works *in* and *around* New Orleans, including Forts Pike and Wood on Lake Pontchartrain, and Fort Livingston on Barataria Bay. They have retired in the direction of Corinth, beyond Manchac Pass, and abandoned everything in the river as far as Donaldsonville, some seventy miles beyond New Orleans.'

Transports conveying troops under General Butler reached New Orleans on the 1st of May, and the actual occupation of the city was begun. There was no armed resistance, but there were constant exhibitions of a malignant spirit and temper both by the people and the

authorities. On the 2d of May, the landing of troops was completed, and on the 6th a proclamation of General Butler, which had been prepared and dated on the 1st, and printed on the 2d by some soldiers, in an office seized for the purpose, was published in the newspapers of
p. 263 the city. Some copies of the proclamation | had been previously dis-



tributed to individuals, but it was not made known generally until thus published.[1]

On this same 6th of May, Flag-officer Farragut made a report to the Government confirming a previous account of his, and stating the arrival of General Butler, on the 29th of April, at New Orleans; the recital of events terminating with the hauling down of the Louisiana State flag from the City Hall, and the hoisting of the American flag on the Custom House on that day, the report closing with this statement:

'Thus, sir, I have endeavored to give you an account of my attack
p 264 upon New Orleans from our first movement to the surrender | of the *city* to General Butler, *whose troops are* NOW *in full occupation.*'

[1] See the work entitled 'General Butler in New Orleans,' by Parton: New York, 1864; pp. 182–3.

The proclamation above referred to declared the city to be under martial law, and announced the principles by which the commanding general would be guided in its administration. One clause is in these words:

'All the rights of property of whatever kind will be held inviolate, subject only to the laws of the United States.'

The other is thus expressed:

'All foreigners not naturalized, claiming allegiance to their respective governments, and not having made oath of allegiance to the government of the Confederate States, will be protected in their persons and property as heretofore under the laws of the United States.'

From whatever date the city was held in subjection, it was so held only by severe discipline; and both it and the region around it was largely hostile. The rebel army was hovering in the neighborhood.

Such were the *facts*. But to understand the arguments in the case, it is necessary to make mention of certain *acts of Congress, proclamations*, &c., as follows:

Congress, by act of July 13, 1861,[1] made it lawful for the President, by proclamation, to declare the inhabitants of any State, or section of it, where insurrection existed, in a state of insurrection against the United States: and 'thereupon,' the statute proceeds:

'All commercial intercourse by and between the same and the citizens thereof and the citizens of the rest of the United States shall cease, and be unlawful so long as such condition of hostility shall continue; and all goods and chattels, wares and merchandise, coming from said State or section into the other parts of the United States, and all proceeding to such State or section by land or water, shall, together with the vessel or | vehicle conveying the same, be forfeited to the United p. 265
States. *Provided*, that the President may in his discretion license and permit commercial intercourse, &c., as he in his discretion may think most conducive to the public welfare,' &c.

The statute enacts also:[2]

'That . . . any ship or vessel belonging in whole or in part to any citizen or inhabitant of said State, or part of a State, whose inhabitants are so declared in a state of insurrection, found at sea or in any part of the United States, shall be forfeited to the United States.'

In pursuance of the authority given by this act, the President, by proclamation of 16th August, 1862,[3] did declare 'Louisiana'—along with several other Southern States—in a state of insurrection against the United States, with interdiction of commerce; excepting, however, the inhabitants of such States 'as may maintain a legal adhesion to the Union and the Constitution, *or may be from time to time occupied and*

[1] § 5; 12 Stat. at Large, 257. [2] § 6; 12 Stat. at Large, 257.
[3] Id. 1262.

controlled by forces of the United States engaged in the dispersion of the said insurgents.'

By a subsequent proclamation,[1] reciting that experience had shown that the exceptions made as above, embarrassed the execution of the act of July 13, 1861 (already mentioned), they were revoked, and the inhabitants of several States, including 'Louisiana,' 'except the ports of New Orleans, &c.,' were declared 'in a state of insurrection,' &c., and all commercial intercourse not licensed, &c., declared unlawful 'until such insurrection shall cease or be suppressed, and notice thereof has been duly given by proclamation.'

On the 12th May, 1862,—that is to say two days before the capture, —the President issued his proclamation, reciting that 'as the blockade of the same ports may *now* safely be relaxed with advantage to the interests of commerce,' therefore he declared that the blockade of the
p. 266 port of New | Orleans, shall so far cease and determine *from and after the 1st day of June*, 1862, that commercial intercourse with it might be carried on except as to persons, things, and information contraband of war.

The question now before this court, on the appeal, was, whether upon the state of facts above presented, the cotton had been properly restored.

Mr. Assistant Attorney-General Ashton, and Mr. Eames, for the appellant:

I. Cooke having been permanently established in New Orleans, and having had uninterrupted commercial and personal domicile there, for ten years previous to the capture, without having either property or residence, actual or constructive, anywhere else, or even any purpose of abandoning his domicile or business at that city, was an enemy, and his property was liable to confiscation if *New Orleans*, when the capture of the property was effected, was enemy territory.[2]

II. Was New Orleans then enemies' territory? Were her people enemies of the United States? That is the question now for this court.

1. In adjudicating the public status, at any particular point of time, of territory within a State once involved in the general hostile relation, the court will follow the acts and declarations, touching and respecting such territory, of the political department of the Government. It *can* do nothing else. The Government is waging war against organized hostile bodies of men, who assert that they act under the authority of the government of 'sovereign States,' and who are contending for an alleged right of exclusive jurisdiction and control over the whole extent

[1] 31 March, 1863; 13 Stat. at Large.
[2] The Indian Chief, 3 Robinson, 18; The Gerasimo, 11 Moore's P. C. 96; The Venus, 8 Cranch, 280.

of territory embraced by such States. The duty of the political power is to pursue the struggle until the rebel organization is destroyed, and the supremacy of the Government is everywhere re-established. But who is to judge where and when the power of | the enemy has been so broken p. 267
as that, with safety to the whole cause, the people and property once subject to hostile control may be released from the law of war, and restored to their rights under the Government? The '*line of insurgent bayonets*,' as Grier, J., denominates it,[1] forced back to-day, may advance to-morrow. Who but the President, whose duty it is to plant the standard of the nation on this hostile soil, can know what measures of war may serve to keep that standard fixed where it may once be planted?

Now, on the 14th of May, the date of this capture, New Orleans was, indeed, in the possession of the United States, but the claim of the *de facto* power, which had been dispossessed, was still actively asserted. Every part of the case,—the language of the chief municipal officer of New Orleans, who declared that he would surrender nothing; that the people would not transfer their allegiance 'from the government of their choice to one which they have deliberately repudiated;' the 'applauded' insult to the flag of the Union; in short, the whole history,—shows defiance and malignity. There is nothing like it in the history of any conquered city whatever. Among our own cities, most, like Savannah, have submitted with grace. In the city was the whole of the late city corporation, hundreds of so-called 'citizens,'—foreign adventurers, many of them, who had risked all that they had or hoped for in the success of their own rebellion,—all ready to consign the city to the traitor Lovell and his army. That army, on the day of this capture, was still in array at the gates of the city, and was there asserting its right to exclude the United States from that soil. Indeed, the enemy's army has never, to this day, been driven from Louisiana. There was no certainty that General Butler could hold possession even if he had it firmly; which, on the day of this capture, he had not. General Banks, in the same State, at a later day, after having been fully in possession on the Red River, was compelled to retire, and the district went right back to the enemy's control. This is matter of history; a history | which p. 268
will make the basis of a decision at this term in this court.[2]

The right of maritime capture was exercisable by the United States after the occupation of the city, not only to promote the complete establishment of its power there, but also with reference to the contingency of its forces being driven from their position, and the city again being subjected to the enemy's power. The duty of the President, in view of this possible event, was to destroy the trade, and diminish the wealth of the place in every way sanctioned by the law of nations.

[1] 2 Black, 647.

[2] See *infra*, Mrs. Alexander's cotton, 2 Wallace, 404.

2. This view of the relations of the executive department to the judicial, or of the judicial to it, in these hostilities, would be well founded and conclusive, even if the President stood upon his ordinary constitutional power. But during this rebellion he wields as well the power conferred by a great national ordinance. The statute of July 13, 1861, authorizes him to interdict all trade and intercourse between all the inhabitants of States in insurrection and the rest of the United States; to subject vessels and cargo to capture and condemnation; and to direct the capture of any vessel belonging in whole or in part to any inhabitant of a State whose inhabitants are in insurrection.

Under this statute, also, the Executive alone has power to determine whether the condition of hostility, which Congress has imposed upon certain States, has or has not in any place ceased to exist; and that determination of the Executive, it must, in every case, be the constitutional duty of the judiciary to carry by its judgments into legal effect.

3. Now, the President's proclamation of the 12th of May, 1862, declares that the *blockade* of New Orleans should thereafter continue to be maintained in full force until the first of the ensuing *June*. This was but two days before the capture of the Venice. The President's proclamation of a blockade, said Grier, J., speaking in the Prize Cases for this court, is '*official and conclusive* evidence to the court that a *state of war* | p. 269 existed at its date, which demanded and authorized a recourse to such a measure, under the circumstances, peculiar to the case.'[1] His Honor was speaking, it is true, of the proclamation of a general blockade made by the President at the outbreak of the war; but both the terms and spirit of his observation apply to the blockade specially at New Orleans. This proclamation, then, on the 12th of May, 1862, declares to all the world that the President, while fulfilling his duties as Commander-in-chief in suppressing rebellion in New Orleans, *after military occupation of the city was achieved*, had continued to meet with such measure of hostile resistance, that until the 1st of June he should continue to need a blockade to aid him in the work wherewith he was intrusted by the Constitution; that the crisis demanded, till *that* date, such force as the *law of war* justifies and sanctions only when employed against enemies and the territory of enemies.

4. But independently of arguments peculiar to the present rebellion, what is the effect, by PUBLIC LAW, of the reduction and occupation during war of a portion of the enemy's territory, under circumstances similar to those that attended the reduction and occupation of New Orleans?

Elphinstone v. *Bedreechund*, in the British Privy Council,[2] is in point. In that case, a British Provisional Government in the East had seized, on the 17th of July, 1818, at Poonah, then recently captured from the

[1] 2 Black, 670. [2] 1 Knapp, 316.

natives by the British, a large amount of treasure of an Eastern prince. *At the time of the seizure, the city had been eight months in the undisturbed possession of the municipal government;* and even courts of justice, under the authority of that government, were sitting in it for the administration of justice. No disturbance had taken place in Poonah itself after it was captured, nor were any actual hostilities carried on in its immediate neighborhood; the headquarters of the British major-general had been, in fact, forty-two miles away. The whole country, however, was in a disturbed state. Poonah was greatly disaffected. 'The enemy were dispersed, but not subdued.' | Poonah was kept in order only by letting p. 270
every one see that there was an overwhelming force on account of their being a disaffected population, and the fact of one government having been overturned and another set up, and the character of the people being turbulent. Proclamations, too, had been issued at Poonah as at New Orleans. The case was much like ours. The question in the suit was one of jurisdiction, *i.e.* whether the case belonged to the civil or to the military courts? This depended on the nature of the seizure, whether it was what is technically called a 'hostile' seizure, or not. Very able counsel, Sir Thomas Denman and others, contended, as the other side would contend here. Speaking of the nature of the war, and the proclamation which had been made, they say:

'It is a war of conquest and annexation, and its sole and avowed object was to place the principality under the dominion of the East India Company. From the moment the proclamation was issued, every part of the country that was conquered became, at the time of its conquest, part and parcel of its dominion and of the crown. On the 16th of November, 1817, the capital was taken possession of by us, and has ever since remained in our possession. It is said that the country was unsettled, or in a state of passage from one settlement to another. Such a state is unknown to our laws. A country must either be in a state of war or a state of peace; although it is sometimes difficult to define the actual boundaries between them. The distinction between the day and the night is perfectly clear, but who can ascertain the exact point where one ends and the other begins. It cannot be disputed that in point of fact, at least, Poonah was perfectly subdued and tranquil.'

But Sir Edward Sugden, then solicitor-general, arguing in support of the seizure, thus gives the answer:

'No country can ever be thoroughly brought under subjection if it is to be held that where there has been a conquest and no capitulation, the mere publication of a proclamation desiring the people to be quiet, and telling them what means would be resorted | to if they did not, so p. 271
far reduces the country under the civil rule that the *army* loses its control, and the municipal courts acquire altogether jurisdiction.'

Of this view was the Privy Council, which, through Lord Tenterden, declared that 'the proper character of the transaction was that of

a hostile seizure made, if not *flagrante*, yet *nondum cessante bello*,' and judgment went accordingly.

The result of the British prize adjudications on this point is, that where the question is as to the national character of a place in an enemy's country, it is not sufficient to show, that possession or occupation of the place was taken, and that, at the time in question, the captor was in control. It must be shown, either that the possession was given in pursuance of a capitulation, the terms of which contemplated a change of national character, or that the possession was subsequently confirmed by a formal cession or by a long lapse of time.[1]

III. Is the property, then, relieved from liability to confiscation by General Butler's proclamation ?

It will be contended that this proclamation is, in effect, a *convention* between the Government and the rebels.

1. But General Butler was without authority to make any such convention. ' To exempt the property of enemies from the effects of hostilities,' says Lord Stowell,[2] ' is a very high act of sovereign authority. If at any time delegated to persons in a subordinate station, it must be exercised either by those who have *special commissions* granted to them for the particular business, or by persons in whom such a power is vested by virtue of any situation to which it may be considered incidental.'
p. 272 The office of General Butler, after the | reduction of the city, was to devise and execute measures for the *preservation of the peace* in the city. The power of setting aside the law of war, of defeating the right of capture given by that law, as well as by statute, to the naval vessels of the nation, and of repealing, in effect, all grants of prize interest, were not powers incidental to the situation and office of a commander of land forces in occupation of an enemy's city.

2. Even if General Butler possessed sufficient authority to give the exemption claimed, he did not by the proclamation, rightly interpreted, attempt to exercise it as respected ships and cargo afloat. Ships and cargo afloat do not come under such expressions as he used. This is settled law. The case of the *Ships taken at Genoa* is in point.[3] In that case one of the articles gave the inhabitants permission ' to withdraw themselves, their money, *merchandise*, *movables*, or *effects*, by *sea* or land,' and another stipulated for ' freedom of trade.' On a question of seizure, it was contended that on these articles the intention of the parties was plain to exempt the *shipping* from seizure, and that it would be nugatory

[1] The Negotie en Zeevaart, in the House of Lords, July 18, 1782; cited in The Danckebar, C. Robinson, 111 ; The Boletta, Edwards, 174 ; The Edel Catharina, 1 Dodson, 56 ; The Dart and Happy Couple, in the House of Lords, 17 March, 1805 ; cited in The Manilla, Edwards, 3 ; The Gerasimo, 11 Moore's Privy Council, 101.

[2] The Hope, 1 Dodson, 227 ; see also the Elsebee, 5 Robinson, 173 ; or 155 American edition of 1807.

[3] 4 Robinson, 388.

to grant 'freedom of trade,' and at the same time seize the vehicles in which trade was carried on. Sir William Scott, however, says:

'If the court was to abstract itself from the consideration of what has usually been understood and done, the terms—"themselves, their money, movables, and effects"—are perhaps large enough to admit this interpretation; although it is an acknowledged rule, that ships—themselves being property of a peculiar species—do not necessarily pass under such a description. It is impossible not to refer to the practice of commanders of other fortunate expeditions, by whom a broad distinction has usually been taken between property afloat and property on land.'

And with respect to the argument made from the expression 'freedom of trade,' he remarks:

'To this observation I can only say that nugatory as such a clause might be, it is every day's practice to seize all property | afloat, and yet to p. 273
allow a general "freedom of trade," exclusive of such particular seizure.'

3. General Butler's proclamations did, in fact, but express an intention to protect the persons named from the *army of the United States*, for which alone he had authority to speak.

4. The idea of protection, considered with reference to a vessel in the situation of the Venice, involves nothing, if not ability to sail on the seas without molestation. But up to the 12th of May, 1862, the blockade of New Orleans was in full force and effectually maintained. It so remained, in fact, till June. General Butler possessed no power to *license* any vessel to violate the blockade; and yet, what avail was a guaranty of *protection* to this vessel and cargo, unless they would have been permitted to sail on any destination out of the port of New Orleans?

The Government, therefore, has not only not ratified or confirmed in any way the supposed action of General Butler, but it has, by the proclamation of May 12, 1862, repudiated whatever act of his is susceptible of the interpretation contended for by the claimant.

IV. Even if the neutral character of the claimant be sustained, the vessel and cargo must be condemned. In a blockaded port, Cooke bought from the enemy an enemy commercial vessel, and then loaded her during the blockade, with property purchased from the enemy, in the enemy country.[1]

Messrs. Reverdy Johnson and Gillet, contra, for the claimant Cooke.

The CHIEF JUSTICE delivered the opinion of the court.

This cause comes before us upon appeal from a decree of the District Court of the United States for the Southern District of Florida.

The schooner Venice, with a cargo of two hundred and | twenty-five p. 274
bales of cotton, was captured in Lake Pontchartrain by the United

[1] The General Hamilton, 6 Robinson, 61; The Vigilantia, 6 id. 124; The Potsdam, 4 id. 89; The Negotie en Zeevaart, 1 id. 111, *et cas. cit.*

States ship-of-war Calhoun, on the 15th of May, 1862; was taken to Key West; was libelled as prize of war in the District Court; and was restored with her cargo, to the claimant, David G. Cooke, by its decree. The United States appealed. The claimant, Cooke, was a British subject, but had resided in New Orleans nearly all the time for ten years preceding the capture. He was a clerk in a large mercantile establishment until June, 1861, when the firm closed its affairs, and he turned his attention to other business, particularly to the collection of planters' acceptances which he had purchased, and to the investment of their proceeds in cotton. Early in April, 1862, he bought two hundred and five bales in Mississippi; and had them brought to New Orleans, where he purchased the Venice on the 9th of April. Finding that the two hundred and five bales would not fully complete the lading of the schooner, Cooke bought twenty bales more about the 12th of April. The whole was put on board with as little delay as possible, and on the 17th of April, the schooner was towed out into Lake Pontchartrain, and taken to the head of the lake, where she was anchored, and remained, with only such change of position as was necessary to obtain a supply of water, until the capture. In the meantime the vessel was undergoing repairs.

While these transactions were in progress, the war was flagrant. The States of Louisiana and Mississippi were wholly under rebel dominion, and all the people of each State were enemies of the United States. The rule which declares that war makes all the citizens or subjects of one belligerent enemies of the Government and of all the citizens or subjects of the other, applies equally to civil and to international wars.[1] Either belligerent may modify or limit its operation as to persons or territory of the other; but in the absence of such modification or restriction judicial tribunals cannot discriminate in its application. |

p. 275 The vessel and the cotton at the time of purchase belonged to citizens either of Mississippi or Louisiana, and was therefore enemies' property.

Did the transfer to Cooke change the character in this respect of both or either?

Cooke was a British subject, but was identified with the people of Louisiana by long voluntary residence and by the relations of active business.[2] Upon the breaking out of the war, he might have left the State and withdrawn his means; but he did not think fit to do so. He remained more than a year, engaged in commercial transactions. Like many others, he seems to have thought that, as a neutral, he could share the business of the enemies of the nation, and enjoy its profits, without

[1] Prize Cases, 2 Black, 666; concurred in by dissenting Justices, Id. 687–8.
[2] Prize Cases, 2 Black, 674.

incurring the responsibilities of an enemy. He was mistaken. He chose his relations, and must abide their results. The ship and cargo were as liable to seizure as prize in his ownership, as they would be in that of any citizen in Louisiana, residing in New Orleans, and not actually engaged in active hostilities against the Union.

This brings us to the consideration of the events which transpired at New Orleans, and in its vicinity, very soon after the Venice was taken into Lake Pontchartrain.

The fleet of the United States, under command of Flag-officer, now Vice-Admiral, Farragut, reached New Orleans on the 25th of April, and the flag-officer demanded the surrender of the city, and required the authorities to display the flag of the Union from the public buildings. The mayor refused to surrender and refused to raise the National Flag, but declared the city undefended and at the mercy of the victors. The flag-officer then directed the flag to be raised upon the Mint. It was raised accordingly, but was torn down on the same or the next day. The flag of the rebellion still floated over the hall where the city authorities transacted business. On the 29th, the Union flag was raised again, both on the Custom House and Mint, and was not again disturbed. On the 30th, the flag-officer received from the | mayor a note so offensive p. 276
in its character, that all communication was broken off.[1] The power of the United States to destroy the city was ample and at hand, but there was no surrender and no actual possession.

The transports conveying the troops under the command of Major-General Butler, commanding the Department of the Gulf, arrived on the 1st of May, and the actual occupation of the city was begun. There was no armed resistance, but abundant manifestations of hostile spirit and temper both by the people and the authorities. The landing of the troops was completed on the 2d of May, and on the 6th a proclamation of General Butler, which had been prepared and dated on the 1st, and the next day printed by some soldiers, in an office seized for the purpose, was published in the newspapers of the city. Some copies of the proclamation had been previously distributed to individuals, but it was not made known to the population generally until thus published. There was no hostile demonstration, and no disturbance afterwards; and we think that the military occupation of the city of New Orleans may be considered as substantially complete from the date of this publication; and that all the rights and obligations resulting from such occupation, or from the terms of the proclamation, may be properly regarded as existing from that time.

This proclamation declared the city to be under martial law, and announced the principles by which the commanding general would be

[1] Message and Documents, 1862–63, part 3, pp. 282–288.

guided in its administration. Two clauses only have any important relation to the case before us. One is in these words: 'All the rights of property, of whatever kind, will be held inviolate, subject only to the laws of the United States.' The other is thus expressed: 'All foreigners, not naturalized, claiming allegiance to their respective governments, and not having made oath of allegiance to the government of the Confederate States, will be protected in their persons and property as heretofore
p. 277 under the laws of the United States.' These clauses only reiterated | the rules established by the legislative and executive action of the national Government, in respect to the portions of the States in insurrection, occupied and controlled by the troops of the Union.

The fifth section of the act of July 13th, 1861, providing for the collection of duties and for other purposes, provided that, under certain conditions, the President, by proclamation, might declare the inhabitants of a State, or any section or part thereof, to be in a state of insurrection against the United States. In pursuance of this act, the President, on the 16th of August following, issued a proclamation declaring that the inhabitants of the States of Virginia, North Carolina, Tennessee, Arkansas, and the other States south of these, except the inhabitants of Virginia west of the Alleghanies, and of those parts of States maintaining a loyal adhesion to the Union and the Constitution, 'or from time to time occupied and controlled by forces of the United States, engaged in the dispersion of the insurgents,' were in a state of insurrection against the United States.

This legislative and executive action related, indeed, mainly to trade and intercourse between the inhabitants of loyal and the inhabitants of insurgent parts of the country; but, by excepting districts occupied and controlled by national troops from the general prohibition of trade, it indicated the policy of the Government not to regard such districts as in actual insurrection, or their inhabitants as subject, in most respects, to treatment as enemies. Military occupation and control, to work this exception, must be actual; that is to say, not illusory, not imperfect, not transient; but substantial, complete, and permanent. Being such, it draws after it the full measure of protection to persons and property consistent with a necessary subjection to military government. It does not, indeed, restore peace, or, in all respects, former relations; but it replaces rebel by national authority, and recognizes, to some extent, the conditions and the responsibilities of national citizenship.

The regulations of trade made under the act of 1861 were framed
p. 278 in accordance with this policy. As far as possible | the people of such parts of the insurgent States as came under national occupation and control, were treated as if their relations to the national Government had never been interrupted.

It is true that the general exception from the prohibition of commercial

intercourse, which has just been mentioned, was cancelled and revoked by the President's proclamation of the 31st of March, 1863, and, instead of it, a particular exception made of West Virginia, and of the ports of New Orleans, Key West, Port Royal, and Beaufort, in North Carolina. But this revocation merely brought all parts of insurgent States under the special licensing power of the President, conferred by the act of July 13, 1861. It affected, in no respect, the general principles of protection to rights and property under temporary government, established after the restoration of the national authority.

The same policy may be inferred from the conduct of the war. Wherever the national troops have re-established order under national rule, the rights of persons and of property have been, in general, respected and enforced. When Flag-officer Farragut, in his first letter to the rebel mayor of New Orleans, demanded the surrender of the city, and promised security to persons and property, he expressed the general policy of the Government. So, also, when Major-General Butler published his proclamation and repeated the same assurance, and made a distinct pledge to neutrals, he made no declaration which was not fully warranted by that policy. There was no capitulation. Neither the assurance nor the pledge was given as condition of surrender. Both were the manifestation of a general purpose which seeks the re-establishment of the national authority, and the ultimate restoration of States and citizens to their national relations, under better forms and firmer guaranties, without any views of subjugation by conquest. Hence, the proclamation of the commanding general at New Orleans must not be interpreted by such rules as governed the case of the *Ships taken at Genoa*.[1] Vessels and their cargoes belonging to citizens | of New Orleans, or neutrals residing p. 279
there, and not affected by any attempts to run the blockade, or by any act of hostility against the United States after the publication of the proclamation, must be regarded as protected by its terms.

It results from this reasoning that the Venice and her cargo, though undoubtedly enemies' property at the time she was anchored in Lake Pontchartrain, cannot be regarded as remaining such after the 6th of May ; for it is not asserted that any breach of blockade was ever thought of by the claimant, or that he was guilty of any actual hostility against the national Government.

It is hardly necessary to add that nothing, in this opinion, touches the liability of persons for crimes or of property to seizure and condemnation under any act of Congress.

DECREE AFFIRMED.

[See *supra, The Circassian ;* a case, in some senses, suppletory or complemental to the present one.]

[1] 4 Robinson, 387.

United States v. Alexander.

(2 Wallace, 404) 1864.

1. The principle, that personal dispositions of the individual inhabitants of enemy territory as distinguished from those of the enemy people generally, cannot, in questions of capture, be inquired into, applies in civil wars as in international. Hence, all the people of any district that was in insurrection against the United States in the Southern rebellion, are to be regarded as enemies, except in so far as by action of the Government itself that relation may have been changed.
2. Our Government, by its act of Congress of March 12th, 1863 (12 Stat. at Large, 591), to provide for the collection of abandoned property, &c., does make distinction between those whom the rule of international law would class as enemies; and, through forms which it prescribes, protects the rights of property of all persons in rebel regions who, during the rebellion, have, in fact, maintained a loyal adhesion to the Government; the general policy of our legislation during the rebellion having been to preserve, for *loyal* owners obliged by circumstances to remain in rebel States, all property or its proceeds which has come to the possession of the Government or its officers.
3. Cotton in the Southern rebel districts—constituting as it did the chief reliance of the rebels for means to purchase munitions of war, an element of strength to the rebellion—was a proper subject of capture by the Government during the rebellion on general principles of public law relating to war, though private property; and the legislation of Congress during the rebellion authorized such captures.
4. Property captured *on land* by the officers and crews of a naval force of the United States, is not 'maritime prize;' even though, like cotton, it may have been a proper subject of *capture* generally, as an element of strength to the enemy. Under the act of Congress of March 12th, 1863, such property captured during the rebellion should be turned over to the Treasury Department, by it to be sold, and the proceeds deposited in the National Treasury, so that any person asserting ownership of it may prefer his claim in the Court of Claims under the said act; and on making proof to the satisfaction of that tribunal that he has never given aid or comfort to the rebellion, have a return of the net proceeds decreed to him.

In the spring of 1864, a conjoint expedition of forces of the United States, consisting of the Ouachita and other gunboats, with their officers and crews, under Rear Admiral Porter, and a body of troops under Major-General Banks, proceeded up the Red River, a tributary of the Mississippi, and which empties into that river three hundred and thirty-
p. 405 four miles above its mouth, as far as Shreveport, in the northwestern corner of Louisiana. The Southern insurgents were, at this time, in complete occupation of the district. About the 15th of March these Government forces captured Fort De Russy, a strong fort, which the insurgents had built, about half way between Alexandria and the mouth of Red River. The insurgents now evacuated the district in such a way that most of that part of it on the river fell under the control of the Union arms. This control, however, did not become permanent. The insurgents rallied; and returning, reinstated themselves. The Union

troops fell back, leaving the district occupied as it had been before they came. The actual presence and control of the Government forces lasted from the middle of March to near the end of April,—something less than eight weeks. During it, an election of delegates to a Union Convention, appeared to have been held in or about Alexandria, under the orders and protection of General Banks, though the evidence of what was done in the matter was not clear. 'The community,' one witness testified, 'was almost unanimous against secession when it commenced, and have so continued.' But of this they gave no overt proofs; none at least that reached this court.

During the advance of the Federal forces, and about the 26th of March, a party from the Ouachita—acting under orders from the naval commander—landed on the plantation of Mrs. Elizabeth Alexander, in the Parish of Avoyelles, a part of the region thus temporarily occupied, and upon the river. They here took possession of seventy-two bales of cotton which had been raised by Mrs. Alexander on the plantation, and which, having escaped a conflagration which the rebels, on the advance of the Government forces, had made of the crop of the preceding year, were stored in a cotton-gin house, about a mile from the river. The cotton was hauled by teams to the river bank, and shipped to Cairo, in Illinois. Being libelled there, as prize of war, in the District Court of the United States for the Southern District of Illinois, and sold *pendente lite*, Mrs. Alexander put in a claim for the proceeds, and the court made a decree giving them | to her. This decree being confirmed in the Circuit p. 406
Court, the United States appealed here.

The question raised before this court was, whether this cotton was or was not properly to be considered as maritime prize, subject to the prize jurisdiction of the courts of the United States.

As respected the nature of the Red River and the character of the vessels used in the conjoint expedition, it appeared that seagoing vessels do not navigate it, the same not affording sufficient water for them; that no other vessels than steamboats of light draft, engaged in the transportation of passengers and freight, usually navigate it; that the gunboats so called, used on this expedition, were of light draft, similar, in many particulars, to steamboats, many of them having been steamboats altered to carry guns and munitions of war generally, though not previously used, nor well capable of being used at sea for any purpose; that guns were mounted on them in order that such guns might be used in connection with and in subordination to the army in its active operations against the enemy in the small streams of the West and Southwest, away from the seaboard.

As regarded Mrs. Alexander's personal loyalty the evidence was not very full. She had assisted somewhat to build Fort De Russy, which

was within a few miles of her own plantation, but, according to the testimony, did this only on compulsion. She was equally kind, it was testified, to loyal persons and to rebels, when either were sick or wounded. She had particular friends among persons of known loyalty; but there were one or two Confederate officers who came to her house,—the testimony being, however, that they were perhaps attracted thither neither by Mrs. Alexander's politics nor by her cotton, but by the beauty of some 'young ladies' who resided with her, and whom they went to 'visit.'

Three weeks *after* the cotton had been seized, Mrs. Alexander took the oath required by the President's proclamation of amnesty, of December 8, 1863; a proclamation which gives to persons who took
p. 407 the oath 'full pardon,' 'with | restoration of all rights,' except as to slaves and 'property, cases where rights of third persons shall have intervened.' But it was upon the condition that persons should thenceforward 'keep their oath inviolate.'[1] Mrs. Alexander never left the territory on which her plantation was situated, nor it. The estate was her own, and she had resided on it since 1835. She was about sixty-five years old at the time of these events.

Such were the *facts*. In order, however, perfectly to comprehend the case as it stood before the court, it is necessary to make mention of certain acts of Congress bearing on it.

Congress, by act of August 6th, 1861,[2] to confiscate property used for insurrectionary purposes, declared, that if any person should use or employ any property in aiding, abetting or promoting the insurrection, or consent to such use or employment, such property should 'be lawful subject of prize and *capture* wherever found.'

And by act of July 17th, 1862,[3] to suppress insurrection, to punish treason and rebellion, to seize and confiscate the property of rebels, &c., it declared (§ 6), that 'all the estate and property' of persons in rebellion, and who, after sixty days public warning [which warning the President gave by proclamation], did not return to their allegiance, *liable to seizure;* and made it the duty of the President to '*seize*' it; prescribing the mode in which it should be condemned.

And by a third act, that of March 12th, 1863,[4] 'to provide for the collection of abandoned property, and for the prevention of frauds in
p. 408 insurrectionary districts,' &c., made | it the duty, under penalty of dis-

[1] The oath now made by Mrs. Alexander, April 19, 1864, was, that she would 'henceforth faithfully support, protect, and defend the Constitution of the United States, and the Union of the States thereunder;' and would, 'in like manner, abide by and faithfully support all acts of Congress passed during the existing rebellion with reference to slaves, so long and so far as not repealed, modified, or held void by Congress, or by decision of the Supreme Court;' and would, 'in like manner, abide by and faithfully support all proclamations of the President made during the existing rebellion, having reference to slaves, so long and so far as not modified or declared void by decision of the Supreme Court.'

[2] 12 Stat. at Large, 319. [3] Id. 591. [4] Id. 821.

mission, &c. (§ 6), of 'every officer or private of the regular or volunteer forces of the United States, or *any officer, sailor or marine in the naval service* of the United States, who may take or receive any such abandoned property, or *cotton*, sugar, rice or tobacco from persons in such insurrectionary districts, or have it under his control, to *turn the same over to an agent*' to be appointed by the Secretary of the Treasury, under whose charge the matter is put by the act, and who accordingly issued regulations in regard to such property. The act provides, however, that none of its provisions shall apply 'to any lawful maritime prize by the naval force of the United States.' This act, it may be added (§ 3), provides that 'any person claiming to have been the owner of such abandoned or captured property may, at any time within two years after the suppression of the rebellion, prefer his claim to the proceeds thereof in the Court of Claims, and on proof to the satisfaction of the said court of his ownership, &c., and that he has never given any aid or comfort to the present rebellion, receive the residue of such proceeds after the deduction of any purchase-money which may have been paid, together with the expense of transportation and sale.'

With these acts there may, perhaps, for the sake of absolute completeness, be presented the act of July 17th, 1862, for the better government of the navy,[1] enacting (§ 2), 'that the proceeds of all ships and vessels, and the goods taken on them, which shall be adjudged good prize, shall, when of equal or superior force to the vessel making the capture, be the sole property of the captors, and when of inferior force be divided equally between the United States and the officers and men making the capture;' and also that of 2d July, 1864,[2] *passed after this capture*, declaring 'that no property, seized or taken upon any of the *inland* waters of the United States by the naval forces thereof, shall be deemed maritime prize,' but shall be turned over, as provided in the already mentioned act of March 12th, 1863. |

Mr. Assistant Attorney-General Ashton, and Mr. Eames, for the United States: p. 409

1. At the time when the combined expedition entered this region, in March, 1864, and when it left it in May, eight weeks afterwards, it was completely in enemy possession and control. Rebel power, civil and military, held it. The region was, therefore, *enemies'* country, and the people were *enemies*, irrespectively of the loyalty or disloyalty of individuals. The *Prize Cases* in this court, and among them *The Amy Warwick*, adjudge this.[3] The fact that there was momentary *military* occupation of the region in part by the co-operating army of the United States on the day of this capture, did not change this enemy character;[4]

[1] 12 Stat. at Large, 606.
[2] 13 Id. 377.
[3] 2 Black, 693; Id. 674.
[4] The Circassian, *supra*.

for the possession of the United States was unfirm, as shown by the event. After constant military activity, the rebel power was reinstated. Independently of all this, insurrectionary and hostile character was fixed upon the region and property by different acts of Congress, including the 'Abandoned and Captured Property Act' of March 12, 1863, which made the property of all people in the region 'liable to seizure;' and made it the duty of the President to 'seize' and have it condemned.

2. The property, though private property, was liable to seizure and confiscation, it being a great commercial staple of the enemy, the product of his own soil, grown and gathered in time of war; in peace his greatest, and in rebellion his only resource. It is matter of common knowledge that cotton has been the means by which the rebel confederation—'this government' of Davis—has procured money or munitions of war from England and France at all.

3. *It is lawful prize of war, though made by the navy on land.* The prize jurisdiction of courts of admiralty in England has always been exercised in cases of belligerent naval capture on land, as much as in cases of naval capture on the high seas; and this, too, whether such capture on land be made by the naval force acting alone or in co-operation
p. 410 with the | army. Enemy property so captured has always, in England, been condemned as prize of war.

This jurisdiction was declared by the Court of King's Bench, A.D. 1781, in the two great cases of *Le Caux* v. *Eden*[1] and *Lindo* v. *Rodney;* Lord Mansfield delivering the judgment of the court in the latter case. The earliest British authorities are there cited and reviewed. Since these two judgments, no part of the law laid down in them has been disputed in England; but, on the contrary, it has been affirmed by the courts of common law, as in *Lord Camden* v. *Home*,[2] and *Smart* v. *Wolff*,[3] and has been accepted and applied to naval captures on land by Lord Stowell and other judges in the High Court of Admiralty in a series of cases.[4] We may refer, also, to the case of *Alexander* v. *The Duke of Wellington*,[5] in the Chancery of England.

In the United States, this British view of the prize jurisdiction of the Court of Admiralty in England over such naval captures on land, has been recognized by this court in *Brown* v. *United States*,[6] and in *Jennings* v. *Carson*,[7] where Marshall, C. J., delivered the opinion.

[1] Douglas, 594, 620. See, also, Mitchell *v.* Rodney, 2 Brown, P. C. 423.
[2] 4 Term, 382. [3] 3 Id. 323.
[4] The Cape of Good Hope, 2 Robinson, 274; Thorshaven, Edwards, 102; The Island of Trinidad, 5 Robinson, 85; Stella del Norte, Id. 311; The Rebekah, 1 Id. 277; The Buenos Ayres, 1 Dodson, 28; The Capture of Chinsurah, 1 Acton, 179; French Guiana, 2 Dodson, 151; Geneva, Id. 444; Tarragona, Id. 487; Cayenne, 1 Haggard, 42, note; Anglo-Sicilian Captures, 3 Id. 192; The Army of The Deccan, 2 Knapp, P. C. 152, and note.
[5] 2 Russell & Mylne, 35. [6] 8 Cranch, 137. [7] 4 Id. 2.

But the District Courts of the United States have all the jurisdiction of the British courts of admiralty, both in prize and on the instance side. The case of *Glass* v. *Sloop Betsy*,[1] decided by this court A. D. 1794, put this point at rest. Its authority, never seriously questioned as to this point, has been recognized in *Talbot* v. *Jansen*,[2] and in *The Brig Alerta*.[3] Judge Story, who is known to have been the author of the note in the Appendix to 2d Wheaton on 'The Principles and Practice in Prize Cases,' apparently takes the view which we here maintain. |

Messrs. Corwine and Springer, contra: p. 411

1. Fort De Russy was captured by the Government forces about the middle of March, and our forces held complete possession—though temporary—for about eight weeks. During this time, an election took place for delegates to a State Convention; which Convention was afterwards held, and a new Constitution formed for that State. Coming after the army had driven the enemy from all that part of Louisiana, and had taken possession of it,—so that her loyal citizens could hold a civil election at which they expressed their constitutional voice for delegates to a State Convention,—the flotilla, commanded by Commodore Porter, which came there to assist General Banks in clearing out the rebel army, seized the cotton in question. Is it possible to affirm of it that it was seized in a country then *enemies'*?

The circumstances of the United States and these insurgent States are peculiar, and different from any presented in the books. In the first place, bands of men have formed combinations to resist the *authority* of the United States in portions of its territory. They deny and will not recognize the laws and authorities of the United States, and have taken up arms to enable them to hold our territory forcibly, to the exclusion of our law officers. We are opposing this rebellious force by armed force, in order that we may reassert our Government's constitutional authority over this territory. As fast as we can repossess ourselves of this territory, which we are constantly doing in greater or less quantity, we invite the people to resume their political and civil rights, and we extend to them the protection of law, supported by our military power. We have done this in West Virginia and in many other places, and those countries are now in the full enjoyment of their political and civil rights. Yet those territories and their people were as much under rebel rule and dominion at one time as is now that part of Louisiana under consideration. The enemy has been frequently in the territory of West Virginia—at this date, February, 1865, the best secured of any—in as strong force as he now is in Louisiana. The duration of his possession has nothing | to do with the rights of the people *restored* to them by the p. 412
act of our Government in resuming its lawful authority over the country.

[1] 3 Dallas, 6. [2] Id. 133. [3] 9 Cranch, 359.

The moment the people were relieved from rebel military rule, the political and civil power of the usurpers was broken, and the jurisdiction and authority of the United States was supreme. It gave to the loyal citizen that *dominion* over his property, accompanied with *rights of property*, such as he enjoyed before this rebel rule intervened.

We have, therefore, only to inquire whether we held that part of Louisiana as reconquered territory for the time we were in possession? Was rebel rule at an end for that time? *While* we maintained the exclusive possession, we held it by a *valid title;* and it does not matter whether there was a full legal resumption of political and civil authority. It was such conquest and such possession as have been held by all authorities, and by our own Government, valid, and as entitling the loyal citizen to the enjoyment of his rights of citizenship and property. No act of the sovereign afterwards, whether the country is lost again by force of the enemies' reconquest, or by treaty and cession, can change it. The rights which accrued to the citizen by the resumption of this authority by his sovereign have become fixed; and if the subject-matter is within the reach of our courts, he may successfully assert them. The legal disabilities which were cast upon him and his property by the forcible and fraudulent occupancy of the country by insurgents, were removed the moment the United States wrested the territory from them and reasserted its authority.[1] It is a matter of common knowledge that vast amounts of property, reaching in value millions of dollars, were released by this single month's possession of our authorities, and that it found its way into the loyal portions of the United States by the simple volition of its owners. The legality of the title thus acquired has never been questioned. This case does not differ from those cases in any respect, except that these naval boats, instead of Government trans-
p. 413 ports, | took out this claimant's cotton. Both were taken out while we held this *exclusive* possession, and there was no enemy there to oppose. The navy might as well have captured that cotton of citizens while afloat, or after it reached its destination in the loyal States, as to have taken Mrs. Alexander's cotton. The legal status of the cotton when it reached the loyal States was no better than it was while on Red River, within our lines and jurisdiction. The principle which made the title valid in one place lost none of its power, in that respect, in the other place. *It was the occupancy and resumption of authority by the United States, in that country, which made the title in the loyal citizen valid.* There was no 'illegal traffic,' such as this court referred to in *The Amy Warwick*, cited by Mr. Assistant Attorney Ashton, which stamped this cotton as 'enemies' property.' It was not at that time within the control of the enemy, so that he could use it for war purposes. It is wholly freed from that difficulty.

[1] Halleck's International Law, 789, and authorities there cited.

The rule being *that the test is the predicament of the property*, not the sentiment or acts of the owner, the court will look at such predicament only. If the owner is not under the jurisdiction and control of the enemy, then his property, being at the time of the alleged capture free from that control, is not in the *predicament* which makes it *ex necessitati rei*, enemy property.

If there were no positive law authorizing the court to recognize and enforce these rights with respect to the territory of which we are daily repossessing ourselves, the rule which we are contending for should be declared by this court as a matter of public policy, growing out of the necessities of our peculiar political situation. As one consequence of this rebellion, rules of property and of personal rights have been and must be declared by the courts, for which there is no clear judicial or legislative precedents. As there should be no right without a remedy, so the courts will not suffer our loyal people, who have been, themselves and their property also, placed in peril by this unfortunate conjunction of political circumstances, for which they are in nowise responsible, | to go away without redress. When delivered from these perils by the p. 414
act of the Government, they and their property should be subjects of fostering care by all departments of the Government, where no rights are to be violated and no well-defined principles ignored. The frequency with which these cases must recur, and the vast magnitude of the interests involved, will not fail to commend them all to the favorable consideration of the court. In *Mitchell* v. *Harmony*[1] this court said: 'Where the owner (of property) has done nothing to forfeit his rights, every public officer is bound to respect them, whether he finds the property in a foreign or hostile country or in his own.'

It is impossible to fix disloyalty on Mrs. Alexander. She took the oath of allegiance at the earliest practicable date. There was no one to administer it to her before the date when she actually took it. Her loyalty saves her property from the operation of the act of 6th of August, 1861, confiscating property used for insurrectionary purposes; and from that also of July 17, 1862, authorizing the President to seize and confiscate the property of rebels. It would be unreasonable to ask, that a *widow*, sixty-five years old, of infirm health, probably, who has lived in one spot—a plantation, in a rural parish—for thirty years, should leave the only home she has on earth, and follow the army of the United States, under penalty of being declared judicially a 'rebel,' and of having her estate confiscated. In such a case, the question of loyalty is to be tested by *animus* and acts. Here all establish loyalty.

Neither does her case come within the Abandoned Property Act of March 12, 1863. It is no part of this case that Mrs. Alexander ever

[1] 13 Howard, 115.

abandoned her plantation. On the contrary, much of the argument of the other side proceeds on a supposition—a true one—that she remained on it; and so remained in an enemy's country.

2. If the property is not enemy's property at all, it matters not
p. 415 whether it be one sort of product or another. It is | to be protected, being *private*. 'Private property on land is now,' says Halleck,[1] 'as a general rule of war, exempt from seizure or confiscation; and this general exemption extends even to cases of absolute and unqualified conquest.'

There are exceptions to this rule, it is true. 1st. Confiscations, or seizures by way of penalty for military offences; 2d. Forced contributions for the support of the invading armies, or as an indemnity for the expenses of maintaining order, and affording protection to the conquered inhabitants; and, 3d. Property taken on the field of battle, or in storming a fortress or town.[2] But there is no pretence that the seizure here is on any such grounds.

If the property were on general grounds liable to seizure, Mrs. Alexander's having taken the oath, should save it. The good faith of the Government is involved. She took the oath of allegiance, in accordance with the invitation of the President's proclamation, December 8, 1863. She is entitled to an honest and faithful compliance on the part of the Government, with all the terms of pardon and exemption as to herself and her property of that proclamation. It is not acting in good faith with her to take her property and treat it as *enemy* property, when she so promptly responded to this Executive invitation. That proclamation, having been issued by the President of the United States, in so far forth as it held out inducements and made promises, and persons acted under and in pursuance with it, constitutes a legal contract, which shall be alike binding on the Government and such persons. The moment she took the oath prescribed by that proclamation, she was entitled to the full benefit of the 'restoration of all rights of property,' as therein promised, so far as this cotton is concerned.

3. *There can be no valid capture by the navy of enemy property on land.* What, in the first place, is this Red River? It is a wholly inland stream. Its mouth is more than three hundred miles from the ocean. But this cotton was not *on* the river even. It was a mile *away from it*, stored in
p. 416 a cotton-gin | house. There is no decision of this court recognizing right of capture by the navy in such cases. The act of July 2, 1864, forbids it. There are some decisions of courts other than this, which, it is contended, go to the necessary extent. But none of them, we think, really do. *Jennings* v. *Carson* simply decides, that the District Court has admiralty and maritime jurisdiction, and makes no reference to the jurisdiction in

[1] International Law, p. 456.

[2] Id. 457.

captures made on land. The same observation is true of *The Brig Alerta*, of *Glass* v. *The Sloop Betsey*, and of *Talbot* v. *Jansen*, cited on the other side.

Counsel argue that the general jurisdiction in maritime and admiralty, which these cases decide as belonging to the District Court, draws after it the jurisdiction of land captures, because it has been recognized in the Prize Courts of England. But the Prize Courts of England derive this peculiar jurisdiction from municipal statutes. To give the court jurisdiction of captures on land, in any other case, it must appear that the property so captured belonged in some way to a capture made on the sea, as in the case of *Lindo* v. *Rodney*. And what sort of a ' navy ' were these inland boats ?

As to the English cases cited by Judge Story in his Essay in 2 Wheaton, it is enough to say, that the case of *Le Caux* v. *Eden*, is the leading one, and that finally went off on the proposition that the treaties, laws of England, and the orders of the Admiral, justified the seizure of the property on land. Lord Mansfield, who decided the case, in the note to it, put his decision on that ground ; the facts of the case did not require him to go further. He also held that when property is once captured on the high seas, and it is unlawfully carried ashore, the captors may recapture it on the land.

It is worthy of remark that *Lindo* v. *Rodney*, and *Alexander* v. *The Duke of Wellington*, cited to sustain the position that lawful captures may be made on land by naval forces, both disclose the important fact that that jurisdiction is derived from municipal law. Lord Mansfield cites and relies upon treaties, acts of Parliament, &c., to sustain this jurisdiction. The statutes are 17 Geo. II, c. 34, § 2, and 29 Geo. II, c. 34, § 2, in which power is given to the Lords of the | Admiralty, to grant p. 417
commissions, &c., ' for attacking or taking with such ship, or with the crew thereof, any place or fortress *upon the land*,' &c. Having cited them, Lord Mansfield says, ' Upon *these* authorities, there can be no doubt of the right to make land captures.' And so in the case of *Alexander* v. *The Duke of Wellington*, it appears that the proceedings sought to be reviewed, were in pursuance to the statute 54 Geo. III, c. 86, § 2, where land captures by the *army* are provided for, and prize-money awarded the officers and men engaged in the capture as booty.

No case has ever arisen in this country which has made it necessary to decide the question broadly. This court, in *Brown* v. *United States*, cited on the other side, rather disclaims the doctrine that captures, as prizes of war, could be made on land, without further legislation by Congress.

The Chief Justice delivered the opinion of the court.

This controversy concerns seventy-two bales of cotton captured in

May, 1864, on the plantation of Mrs. Elizabeth Alexander, on the Red River, by a party sent from the Ouachita, a gunboat belonging to Admiral Porter's expedition. The United States insist on the condemnation of the cotton as lawful maritime prize. Mrs. Alexander claims it as her private property. The facts may be briefly stated.

In the spring of 1864, a naval force of the United States, under Rear Admiral Porter, co-operating with a military force on land, under Major-General Banks, proceeded up Red River towards Shreveport, in Louisiana. The whole region at the time was in rebel occupation, and under rebel rule. Fort De Russy, about midway between the mouth of the river and Alexandria, was captured by the Union troops about the middle of March. The insurgent troops gradually retired until a considerable district of country on Red River came under the control of the national forces. This control, however, was of brief continuance. An unexpected reverse befell the expedition. The army under General Banks was defeated, and was soon after entirely withdrawn from the Red River country.
p. 418 The naval force, under Admiral Porter, | necessarily followed, and rebel rule and ascendency were again complete and absolute. The military occupation by the Union troops lasted rather less than eight weeks. Its duration was measured by the time required for the advance and retreat of the army and navy. The Parish of Avoyelles was a part of the district thus temporarily occupied; and the plantation of Mrs. Alexander was in this parish, and upon the river. The seventy-two bales of cotton in controversy were raised on the plantation, and were stored in a warehouse about a mile from the river bank. A party from the Ouachita, under orders from the naval commander, landed on the plantation about the 26th of March, and took possession of the cotton. It was sent to Cairo; libelled as prize of war in the District Court for the Southern District of Illinois; claimed by Mrs. Alexander; and, by decree of the District Court, restored to her. The United States now ask for the reversal of this decree, and the condemnation of the property as maritime prize.

After the seizure of the cotton, Mrs. Alexander took the oath required by the President's proclamation of amnesty. The evidence in relation to her previous personal loyalty is somewhat conflicting. She had furnished mules and slaves, involuntarily as alleged, to aid in the construction of the rebel Fort De Russy. She now remains in the rebel territory. Before the retreat of the Union troops, elections are stated to have been held, under military auspices, for delegates to a constitutional convention about to meet in New Orleans.

These facts present the question: Was this cotton lawful maritime prize, subject to the prize jurisdiction of the courts of the United States?

There can be no doubt, we think, that it was enemies' property.

The military occupation by the national military forces was too limited, too imperfect, too brief, and too precarious to change the enemy relation created for the country and its inhabitants by three years of continuous rebellion; interrupted, at last, for a few weeks; but immediately renewed, and ever since maintained. The Parish of Avoyelles, | which p. 419
included the cotton plantation of Mrs. Alexander, included also Fort De Russy, constructed in part by labor from the plantation. The rebels reoccupied the fort as soon as it was evacuated by the Union troops, and have since kept possession.

It is said, that though remaining in rebel territory, Mrs. Alexander has no personal sympathy with the rebel cause, and that her property therefore cannot be regarded as enemy property; but this court cannot inquire into the personal character and dispositions of individual inhabitants of enemy territory. We must be governed by the principle of public law, so often announced from this bench as applicable alike to civil and international wars, that all the people of each State or district in insurrection against the United States, must be regarded as enemies, until by the action of the legislature and the executive, or otherwise, that relation is thoroughly and permanently changed.

We attach no importance, under the circumstances, to the elections said to have been held for delegates to the constitutional convention.

Being enemies' property, the cotton was liable to capture and confiscation by the adverse party.[1] It is true that this rule, as to property on land, has received very important qualifications from usage, from the reasonings of enlightened publicists and from judicial decisions. It may now be regarded as substantially restricted 'to special cases dictated by the necessary operation of the war,'[2] and as excluding, in general, 'the seizure of the private property of pacific persons for the sake of gain.'[3] The commanding general may determine in what special cases its more stringent application is required by military emergencies; while considerations of public policy and positive provisions of law, and the general spirit of legislation, must indicate the cases in which its application may be properly denied to the property of non-combatant enemies.

In the case before us, the capture seems to have been justified | by p. 420
the peculiar character of the property and by legislation. It is well known that cotton has constituted the chief reliance of the rebels for means to purchase the munitions of war in Europe. It is matter of history, that rather than permit it to come into the possession of the national troops, the rebel government has everywhere devoted it, how ever owned, to destruction. The value of that destroyed at New Orleans, just before its capture, has been estimated at eighty millions of dollars.

[1] Prize Cases, 2 Black, 687. [2] 1 Kent, 92. [3] Id. 93.

It is in the record before us, that on this very plantation of Mrs. Alexander, one year's crop was destroyed in apprehension of an advance of the Union forces. The rebels regard it as one of their main sinews of war; and no principle of equity or just policy required, when the national occupation was itself precarious, that it should be spared from capture and allowed to remain, in case of the withdrawal of the Union troops, an element of strength to the rebellion.

And the capture was justified by legislation as well as by public policy. The act of Congress to confiscate property used for insurrectionary purposes, approved August 6th, 1861, declares all property employed in aid of the rebellion, with consent of the owners, to be lawful subject of prize and capture wherever found.[1] And it is further provided, by the act to suppress insurrection, and for other purposes, approved July 17, 1862,[2] that the property of persons who had aided the rebellion, and should not return to allegiance after the President's warning, should be seized and confiscated. It is in evidence that Mrs. Alexander was a rebel enemy at the time of the enactment of this act; that she contributed to the erection of Fort De Russy, after the passage of the act of July, 1862, and so comes within the spirit, if not within the letter, of the provisions of both.

If, in connection with these acts, the provisions of the Captured and Abandoned Property Act of March 12, 1863,[3] be considered, it will be difficult to conclude that the capture under consideration was not
p. 421 warranted by law. This | last-named act evidently contemplated captures by the naval forces distinct from maritime prize; for the Secretary of the Navy, by his order of March 31, 1863, directed all officers and sailors to turn over to the agents of the Treasury Department all property captured or seized in any insurrectionary district, excepting lawful maritime prize.[4]

Were this otherwise, the result would not be different, for Mrs. Alexander, being now a resident in enemy territory, and in law an enemy, can have no standing in any court of the United States so long as that relation shall exist. Whatever might have been the effect of the amnesty, had she removed to a loyal State after taking the oath, it can have none on her relation as enemy voluntarily resumed by continued residence and interest.

But this reasoning, while it supports the lawfulness of the capture, by no means warrants the conclusion that the property captured was maritime prize. We have carefully considered all the cases cited by the learned counsel for the captors, and are satisfied that neither of them is an authority for that conclusion. In no one of these cases does it appear

[1] 12 Stat. at Large, 319. [2] Id. 591. [3] Id. 820.
[4] Report of the Secretary of the Treasury on the Finances, December 10, 1863, p. 438.

that private property on land was held to be maritime prize; and on the other hand, we have met with no case in which the capture of such private property was held unlawful except that of Thorshaven.[1] In this case such a capture was held unlawful, not because the property was private, but because it was protected by the terms of a capitulation. The rule in the British Court of Admiralty seems to have been that the court would take jurisdiction of the capture, whether of public or private property; and condemn the former for the benefit of the captors, under the prize acts of Parliament, but retain the latter till claimed, or condemn it to the Crown, to be disposed of as justice might require. But it is hardly necessary to go into the examination of these English adjudications, as our own legislation supplies all needed guidance in the decision of this case. |

There is certainly no authority to condemn any property as prize p. 422
for the benefit of the captors, except under the law of the country in whose service the capture is made; and the whole authority found in our legislation is contained in the act for the better government of the navy, approved July 17th, 1862. By the second section of the act,[2] it is provided that the proceeds of all ships and vessels, and the goods taken on board of them, which shall be adjudged good prize, shall be the sole property of the captors, or, in certain cases, divided equally between the captors and the United States. By the twentieth section, all provisions of previous acts inconsistent with this act are repealed. This act excludes property on land from the category of prize for the benefit of captors; and seems to be decisive of the case so far as the claims of captors are concerned.

As a case of lawfully captured property, not for the benefit of captors, its disposition is controlled by the laws relating to such property. By these laws and the orders under them, all officers, military and naval, and all soldiers and sailors, are strictly enjoined, under severe penalties, to turn over any such property which may come to their possession to the agents of the Treasury Department, and these agents are required to sell all such property to the best advantage, and pay the proceeds into the National Treasury. Any claimant of the property may, at any time within two years after the suppression of the rebellion, bring suit in the Court of Claims, and on proof of ownership of the property, or of title to the proceeds, and that the claimant has never given aid or comfort to the rebellion, have a decree for the proceeds, deducting lawful charges. In this war, by this liberal and beneficent legislation, a distinction is made between those whom the rule of international law classes as enemies. All, who have in fact maintained a loyal adhesion to the Union, are protected in their rights to captured as well as abandoned property.

[1] Edwards, 107.

[2] 12 Stat. at Large, 606.

p. 423 It seems that, in further pursuance of the same views, by | an act of the next session, Congress abolished maritime prize on inland waters, and required captured vessels and goods on board, as well as all other captured property, to be turned over to the Treasury agents, or to the proper officers of the courts. This act became a law a few weeks after the capture now under consideration, and does not apply to it. It is cited only in illustration of the general policy of legislation, to mitigate, as far as practicable, the harshness of the rules of war, and preserve for loyal owners, obliged by circumstances to remain in rebel States, all property, or its proceeds, to which they have just claims, and which may in any way come to the possession of the Government or its officers.

We think it clear that the cotton in controversy was not maritime prize, but should have been turned over to the agents of the Treasury Department, to be disposed of under the act of March 12th, 1863. Not having been so turned over, but having been sold by order of the District Court, its proceeds should now be paid into the Treasury of the United States, in order that the claimant, when the rebellion is suppressed, or she has been able to leave the rebel region, may have the opportunity to bring her suit in the Court of Claims, and, on making the proof required by the act, have the proper decree.

The decree of the District Court is reversed, and the cause remanded, with directions to

DISMISS THE LIBEL.

The Baigorry.

(2 Wallace, 474) 1864.

1. The blockade of the *coast of Louisiana*, as established there, as on the rest of the coast of the Southern States generally, by President Lincoln's proclamation of 19th April, 1861, was not terminated by the capture of the forts below New Orleans, in the end of April, 1862, by Commodore Farragut, and the occupation of the city by General Butler on and from the 6th of May, and the proclamation of President Lincoln of 12th May, 1862, declaring that after June 1st the blockade of the port of *New Orleans* should cease. Hence, it remained in force at Calcasieu, on the west extremity of the coast of Louisiana, as before.
2. The fact that the master and mate saw, as they swear, no blockading ships off the port where their vessel was loaded, and from which she sailed, is not enough to show that a blockade, once established and notified, had been discontinued.
3. Intent to run a blockade may be inferred in part from delay of the vessel to sail after being completely laden; and from changing the ship's course in order to escape a ship of war cruising for blockade-runners.
4. A vessel and cargo, even when perhaps owned by neutrals, may be condemned as enemy property, because of the employment of the vessel in enemy trade, and because of an attempt to violate a blockade, and to elude visitation and search.

THE schooner Baigorry, laden wholly with cotton, was captured at
p. 475 sea, about one hundred miles off Havana, to | which port she was sailing

from Calcasieu Pass, in Louisiana, by the United States brig-of-war Bainbridge, *on the 9th of June*, 1862, and taken into Key West, where both cargo and schooner were libelled as prize of war. The ground, in fact, of the proceeding was,

1. Alleged violation of the blockade, established by President Lincoln's proclamation of 19th April, 1861.

2. That the cargo and ship were enemy's property.

The defence in turn was,

1. That no blockade had been broken; there not, as was alleged, having, in fact or in law, been any blockade at the date when the vessel sailed. And,

2. That the cargo and vessel were neutral property, and protected under a certain proclamation of General Butler's, made May 6th, 1862, hereinafter mentioned.

The cotton, according to the mate's testimony, had been laden at Calcasieu, in the State of Louisiana, *between* the 27th of April and *the 3d of May*, 1862. The vessel sailed from Calcasieu on the *26th of May*. [Dates in this case are important.] Calcasieu Pass is on the western portion of the coast of Louisiana, and towards the western boundary of the State. Its topographical relation to the mouths of the Mississippi, New Orleans, and the country about the two, will be indicated with sufficient nearness to give the reader not acquainted with this special region an idea of things, by an arrow in the lower and left corner of the diagram, at page [1484]. An extension of the line of the arrow to the coast (cut off on the diagram) would indicate the position of Calcasieu.

As mentioned in two previous cases in this volume,[1] and as is matter of known history, Commodore Farragut captured and took possession of the forts below New Orleans, then in possession of the Southern rebels, *in the end of April*, 1862; and General Butler, as a consequence, entered New Orleans on the 1st of May; his occupation of which by the 6th was complete. Prior to this last date, various other | forts about New Orleans p. 476
were abandoned or destroyed, and the navigation of the Mississippi, from its mouth, for a considerable distance upwards, left clear. But none of the places certainly abandoned were near to Calcasieu; nor although Commodore Farragut reported to the Government that 'a general stampede' was taking place as a consequence of the capture, were the rebels at that date driven out of Louisiana generally. The 'stampede' was general, as described; but it was general apparently only in the regions which were the theatre of the brave Commodore's operations, the region, namely, about New Orleans. On the *6th of May*, General Butler issued a proclamation, written and dated on the 1st, in which he

[1] The Circassian and the Venice, *supra*, one or both of which cases should be read before this.

stated, that New Orleans and its environs having surrendered, were then occupied by the United States forces; that all foreigners not naturalized and claiming allegiance to their respective governments, and not having made oath of allegiance to the government of the Confederate States, would be protected in their persons and property, as heretofore, under the laws of the United States; and that the rights of property, of whatever kind, would be held inviolate, subject only to the laws of the United States. All the inhabitants were enjoined to pursue their usual avocations.

The proclamation of blockade referred to above, as having been made by President Lincoln, April 19, 1861, was declared from the first, by the Government, to be a blockade of the whole Southern coast of the United States. After the capture and complete occupation of New Orleans, that is to say, on the 12th of May, 1862, fourteen days before the Baigorry sailed at all from Calcasieu Pass, the President issued another proclamation, in which he declared that the blockade of the *port of New Orleans* should so far cease and determine, from and after the 16th of June, 1862, as that commercial intercourse with it might be carried on after the 1st of June following, except as to persons and things contraband.

The charge of breaking the blockade was resisted, therefore, partly
p. 477 on the ground that the blockade had been raised | by the Executive, but more on the fact testified to by the captain of the vessel, that he saw no blockaders either when he went into Calcasieu, or when he came out of it. He swore 'he knew, before going to sea, that the city of New Orleans had been taken by the United States before the vessel left Calcasieu; and had information that the United States had allowed vessels to go from Berwick's Bay[1] to Sabine, after being visited.' He knew, also, as he swore, 'that there had been an order of blockade of the ports of the *State of Louisiana*; but he thought that the ports of the State were open after the capture of New Orleans. He wished to go to New Orleans for a clearance from the United States authorities; *but was not allowed by the Confederates to pass through the country.* He had seen blockading vessels in February, 1862, when sailing from Havana towards the coast of Louisiana, *without having any fixed port of destination*, but saw none either when he entered or when he left Calcasieu, on this last voyage, though he saw a steamer passing along at a distance from the coast once, while the Baigorry was at Calcasieu.'

The mate testified that he knew that on the 26th of May, when the Baigorry set sail, 'the ports of Louisiana were then declared to be

[1] The position of Berwick's Bay may be seen by reference to the diagram at page [1484]. It runs south from 'Berwick.' Sabine is on the Sabine River, the river which divides Louisiana from Texas.

blockaded, but he did not see any vessel then on the coast. He saw steamships at a distance off the coast twice, while the Baigorry lay at Calcasieu Pass. He did not know what they were.'

The Bainbridge was first seen the evening before the capture. 'I changed the course,' said the captain, 'after I saw that the Bainbridge was waiting for me, in order to avoid her. There was very little wind.' No spoliation of papers or concealment were alleged.

The business of the vessel was thus described by the captain :

'I first saw her in November, 1861, at Grand Caillou, a port | on the p. 478
coast of Louisiana. She made a voyage from that place to Havana, and thence to Calcasieu, last before the voyage on which she was taken. She carried cotton from Grand Caillou to Havana, and brought groceries, shoes, clothing, medicines, and wine to Calcasieu. She took cotton at Calcasieu, which was on board when she was taken. This last voyage would have ended at Havana, unless the port of New Orleans had been opened.'

So far as to breaking the blockade. Next as to the character of the ownership and the character of the trade in which she was employed.

She was first the property of her builder, at Grand Caillou, Louisiana, from whom one Adolphe Mennet, of New Orleans, purchased her, in October or November, 1861. She was American built; at the time named the Three Brothers, and had before borne the name of the G. W. Goodwin. Mennet, the owner, appointed Renaud, who was now commanding her at New Orleans, to command her, in December, 1861. Both lived at New Orleans; Renaud, who was a naturalized citizen of the United States, having lived there since 1853, and having a family there. They went to Grand Caillou, where Mennet placed Renaud in possession.

Renaud, whilst at Havana, under an alleged power of attorney from Mennet, sold or pretended to sell the schooner to an Englishman named Frederick Thensted, and under a British provisional certificate of registry, issued by the British consul-general at Havana, the new title and name of the British schooner Baigorry was given to her. Renaud (whose statement was the only evidence of the sale, no bill of sale having been produced) could not remember, so he swore, what her price was; but he swore that 'it was paid to Charles Caro & Co.,' a house well known as the consignees, at Havana, of blockade-runners. But it appeared by an entry on the British register, made at New Orleans, March 29, 1862, by a notary, that the vessel was mortgaged and hypothecated by Thensted to Adolphe Mennet, to secure payment for the sum of $5000, amount of two promissory notes. This practice of mortgaging, it may be here | p. 479
stated, was a frequent method, during the rebellion, of securing one man's interest in a vessel whilst she was passing under cover of another's name.

The crew, chiefly French, Italian, and Spanish, were shipped at New Orleans, by order of the master, on the 16th of April, 1862, and went on

board at Calcasieu on the 20th. It may be noted that, at that time, the concentration of our forces in the operations for the capture of New Orleans, made it impossible to load for blockade-running at that port. The master swore that the cargo was owned by several French citizens residing in New Orleans, and was shipped by one Durell, also of New Orleans, for them, and was consigned to Caro & Co., of Havana, to be delivered at that place for, and on account, risk, and benefit of, the said French citizens. A claim filed by Renaud for them, and the only claim made, asserted the same facts. The manifest swore to by Renaud, 14th of April, 1862, at New Orleans, accorded with these statements. The bill of lading represented the cargo as shipped at New Orleans, by Cassillo and Harispe. The vessel cleared for Havana, at the ' Confederate ' custom-house at New Orleans, on the 14th of April, 1862.

The court below condemned both vessel and cargo as enemy property. Appeal here.

Mr. Coffey, special counsel for the United States. Messrs. Reverdy Johnson and Gillet, contra.

The CHIEF JUSTICE delivered the opinion of the court.

The Baigorry and cargo were owned by residents of New Orleans, claiming to be subjects of Great Britain and France. She was employed in the trade of the enemy, plying between Havana and ports of Louisiana, and finding entrance as she could, by running the blockade. The cotton with which she was laden was shipped, according to the testimony of the mate, at Calcasieu Pass, between the 27th of April and the 3d of May ; but she did not sail, if the master be credited, till the 26th of May. Cal-
p. 480 casieu Pass, and all the neighboring | region was in possession of the rebels, and the establishment of the blockade was well known to the officers of the schooner. The master says that he saw no blockading vessels off Calcasieu when he went in or when he came out. The mate, in answer to the same interrogatory, says nothing of what he saw when the schooner entered the Pass, but asserts that he saw no blockader when he came out. But the master says also, that he saw blockading ships as he was going towards the coast of Louisiana in February, and also, saw a steamer passing along the coast, while the schooner was at Calcasieu. The mate says he saw steamships—not one, but several—off the coast during the same time. It is also in evidence, that when the master of the Baigorry saw the Bainbridge, on the afternoon before the capture, and that she was hove to and waiting for him, he changed his course to avoid her.

We have already held, that a blockade once established, and duly notified, must be presumed to continue until notice of discontinuance, in the absence of positive proof of discontinuance by other evidence ; and we do not think that the testimony of the master and mate that they saw no blockaders when entering or leaving Calcasieu Pass, supplies such

proof. On the contrary, we think that positive proof that the blockade was not discontinued, is made by the admissions that blockaders were seen when the Baigorry approached the coast, and that one or more steamships were seen off the coast while she lay within Calcasieu Pass.

No attempt is made to account for her delay in sailing, from the 3d to the 26th of May, after her cargo was on board ; and the absence of any explanation of this circumstance, warrants the inference that she was watching her opportunity to get out without being seized. It goes to establish guilty intent. So, too, the endeavor to escape from the Bainbridge. No such attempt would have been made, had the officers of the Baigorry been unconscious of any infringement of the blockade.

The proof of violation of the blockade, and of its existence | both when p. 481
the schooner entered and when she left Calcasieu Pass, is clear.

We think, also, that both ship and cargo were rightly condemned by the District Court as enemies' property. It is claimed that both belonged to neutrals resident in New Orleans, and entitled to protection under proclamation,[1] and the proof, to some extent, supports this claim ; but both were liable to be condemned as enemies' property, because of the employment of the vessel in enemies' trade, and because of the attempt to violate the blockade, and to elude visitation and search by the Bainbridge. On this latter point, the language of Chief Justice Marshall, in *Maley* v. *Shattuck*,[2] is express.

DECREE AFFIRMED.

The Andromeda.

(2 Wallace, 481) 1864.

1. A vessel and cargo condemned as enemy property, under circumstances of suspicion,—spoliation of papers in the moment of capture being one of them as regarded the cargo, and a former enemy owner remaining in possession as master of the vessel through a whole year, and through two alleged sales to neutrals, being another, as respected the vessel,—the alleged neutral owners, moreover, who resided near the place where the vessel and cargo were libelled, handing the whole matter of claim and defence over to such former owner as their agent, and giving themselves but slight actual pains to repel the inference raised *primâ facie* by the facts.
2. A libel in prize need not allege for what cause a vessel has been seized, or has become prize of war, as *ex. gr.*, whether for an attempted breach of blockade or as enemy property. It is enough if it allege generally the capture as prize of war.
3. A blockade once regularly proclaimed and established will not be held to be ineffective by continual entries in the log-book, supported by testimony of officers of the vessel seized, that the weather being clear, no blockading vessels were to be seen off the port from which the vessels sailed.

ON the 20th of May, 1862, the schooner Andromeda, with a cargo of cotton and hides, was captured off the coast of | Cuba by the Pursuit, p. 482

[1] The Venice, *supra*.

[2] 3 Cranch, 488.

a sloop-of-war of the United States. The schooner at the time was bound to Havana, on a voyage from the port of Sabine, in Texas, where she had received her cargo. Being brought into Key West, she was libelled by the District Attorney of the United States as 'lawful *prize of war*, and subject to condemnation and forfeiture as such;' the libel, however, not stating for *what cause* she was seized, or had become 'lawful prize of war,' as set up in that document.

The manifest read thus:

EXPORT MANIFEST.

Manifest of the cargo on board the schooner Andromeda, of the burden of 229 $\frac{5}{100}$ tons, whereof J. H. Ashby is master, bound from Sabine Pass to Havana.

Name of Shippers.	Marks and numbers.	Number of entries.	Packages or articles in bulk.	Contents or quantities.	Names of consignees.	Value at the port of exportation of domestic produce or merchandise.
Andromeda & Culmell	Various	597	597 bales cotton	297,514 pounds	Chas. Caro & Co.	$31,000 00
Do.	F v C.	291	291 hides.	1,164 pounds	do. do.	58 20
Total amount,	.....	..	.....	.....	.....	$31,058 20

The bill of lading, described Edmonson and Culmell as shippers of all the items of the cargo.

As to the ownership of the cargo libelled, as mentioned. The master of the vessel, Ashby, admitting that ninety bales of the cotton belonged to him, set up that *one hundred* belonged to a certain Culmell, 'a native citizen of Denmark,' and for ten years resident in Texas, where he was in trade as a partner of one Edmonson; and that the *remainder* of the cotton and all the hides belonged to Messrs. Caro & Co., merchants of Havana, to whom they were consigned. Caro & Co. were French subjects. Culmell made the same defence as to one hundred bales. Caro & Co. gave a power of attorney to the captain, to claim for them
p. 483 as theirs, all the hides and the whole cargo, with the exception of the one hundred and ninety bales; but, notwithstanding that an order for further proof was granted to allow them to exhibit proof of their ownership, they did not themselves appear at Key West, nor take any more active measures to protect their interests thus, by their answer, set up.

Ashby himself, was examined *in preparatorio*. His answers were, that 'he was born in New York,—now lives in Louisiana,—owes allegiance to Louisiana and the Confederate States,—is not a citizen of the United States,—is married, and has a family in Louisiana.' It appeared that he

bought and took possession of the vessel in October, 1860, before the rebellion broke out ; came soon afterwards to the Gulf and New Orleans, in which city he was when the war broke out, and which he left soon afterwards on the vessel (now, according to his account, sold), as master, and had been sailing since chiefly in those regions on her.

Just after the vessel hove to, and before the capturing officers from the Pursuit came on board, the steward, one Monsell, by order of Culmell, who was on board, and at the time with the captain, in the cabin, threw over a package of papers. The captain swore that he did not know what they were ; the steward said, that he supposed they were newspapers. Culmell swore, that ' the invoice and bills of lading of the portion of the cargo *owned by himself*, were thrown over ; he did not know who threw them overboard, but he gave them to the steward on the day of the capture, with orders to have them thrown overboard.'

The vessel had left Havana on the 8th of March, 1862, under the British flag, but with the American flag on board ; her destination having apparently been Matamoras. Her cargo consisted of coffee, soap, oil, salt, candles, shoes, &c. ; and running the blockade, legal or ineffective, then established by our Government, she arrived at Sabine, March 16th. This cargo was delivered to Messrs. Edmonson & Culmell, who received and sold it ' *on account of the schooner | Andromeda* ; ' and their account p. 484 showed a large balance ' due the *schooner* on the cargo.'

As to the ownership of the vessel. The vessel was American built. Prior to the rebellion she had belonged confessedly to Ashby, her now captain, who first saw her at Bridgeport, Connecticut, in 1860. Soon after the breaking out of the war he sold her, in May, 1861, at New Orleans, according to his own sworn statement, to a certain Richard Alleyn, described in the register as ' of Baltimore, in the county of Cork, Ireland, residing at the time in New Orleans,' a British subject ; and documents, attested by the British consul at New Orleans, one Mure, showed that various *forms*, indicative of a *bonâ fide* sale, had been gone through with great regularity. Alleyn sold her in March, 1862, according to the account, to a certain Gerald Thomas Watson, her now claimant. Watson was asserted to be a merchant of Havana, and, like Alleyn, a British subject. He was no doubt a British subject, but where he lived was not so plain. In one consular paper he was described as of ' No. 52 Cornhill, London.' *Ashby remained all the time in command of the vessel.* In reply to a question under an order allowing further proofs, he gave, under oath, a narrative, substantially as follows, showing the motives of the transfer, and the causes of his own continuing possession of her.

' *To the fourth interrogatory the witness answers :* At the time of the purchase by Alleyn, and her transfer to the English flag and register, a blockade of the port of New Orleans was expected to be laid in a few

weeks. Alleyn resided in New Orleans. He intended to send the vessel to sea in order that she might not be useless property to him during the time the blockade should exist. This witness was appointed to her command by Alleyn, because he, the witness, was a person of some property, and would be responsible to Alleyn in case of a mismanagement of the vessel. On account of the blockade, no owner could expect to communicate with the vessel for a long term of time, and would have to suffer her earnings to accumulate and remain in the hands of her
p. 485 master. The witness, as master, sailed the | schooner for Alleyn upon a contract, by which the witness was to have entire control and direction of the vessel; pay her entire expenses; engage her in the most profitable trade possible, and receive one-half of her earnings as a compensation,—a common rate of contract and compensation for masters sailing vessels of her class. Under this contract he sailed from New Orleans with a cargo to Matamoras, in Mexico; remained there about a month; discharged her cargo; and there being no freight for vessels there at that season he sailed in ballast to Havana, in Cuba, and endeavored to obtain freight there, but was unable to do so for three months, at the expiration of which time he obtained a cargo of sugar and molasses for New York, at low rates for freight, with which he proceeded to New York, where the schooner was seized by the Federal authorities under the allegation that she was liable to confiscation under the provisions of the act of Congress of July 18, 1861, but was soon afterwards released. The witness returned to Havana with a general cargo of merchandise, and was unable to procure another freight for a long time. The expenses of the vessel thus accumulating rapidly, and she earning nothing, induced the witness, on receiving an offer of purchase from the claimant Watson, to accept the same, which course he believed was for the interest of her owner, Alleyn. One of the conditions of the sale was, the witness should be retained in command until the new owner should find some person who would sail her at lower rates of compensation. This stipulation was attached because this witness was cut off from New Orleans by the blockade, and had no remunerative employment, and for no other reason. In accordance with the stipulation, the witness took command of the schooner, and was to receive for pay five per cent. of the entire and gross charges for freight upon cargo carried by said vessel while he remained in command.'

The log-book of the vessel was put in evidence, and the entries read from March 8, 1862, to the date of her sailing from Sabine, 10th of May, and indeed till the capture. Constantly throughout the log, with entries of 'the pumps now working well,' or the reverse of it; how the day 'came in;' and how ended 'these twenty-four hours;' that the ship
p. 486 'kept the Sabbath' on Sundays, and 'took in cotton,' | 'took in hides,' during the week;—'lower hold full,'—were entries like these during the time she was in the harbor of Sabine,—a port which commands a view of the ocean:

'No blockade in sight, fine weather.' 'No blockading vessel off.' 'No blockade off, clear weather.' 'No blockade off the bar, fine and pleasant day.' 'No vessel in sight, clear day, wind from south.' 'Day

commences with fine weather, no blockading vessels in sight.' 'Saw no blockading vessels, clear, with breeze from south and southeast.' 'No blockade in sight, pleasant weather.'

And Culmell and Ashby, and the steward Monsell, alike swore that they saw no blockading vessels at any time; and that the vessel had not attempted, so far as they knew of, to go in or come out of any port when it was blockaded.

Noting that Caro & Co., though of Havana, had taken no further interest in the proceeding at Key West, near to them, than to sign a power of attorney to Ashby, the District Court considered that the claim set up by or for these persons to the bulk of the cargo, 'was an attempt to cover up hostile property by the use of neutral names;' and that the whole cargo, except the portions claimed by Culmell (plainly confiscable), belonged to Ashby; that Ashby, too, was owner of the vessel; of which 'his all along continuing in the command, notwithstanding the alleged sale by him to Alleyn, and by Alleyn afterwards to Gerald Thomas Watson,' was a pregnant proof. That court accordingly condemned vessel and cargo. The question before this court was, whether the condemnation was warranted.

Messrs. Gillet and Reverdy Johnson, for the claimants, contended that there was *no sufficient* evidence to condemn either cargo or vessel in total at all. A portion of the cargo is admitted to have belonged to Culmell, and some to Ashby; but the bulk of it stood on a different footing, and should not be condemned. Nothing could be argued from the destruction of papers beyond the fact that Culmell owned a portion (which fact is admitted), and was fearful about this, *his* part, hoping to save it. Caro & Co. are not touched. There is, therefore, as to the bulk of the property, no evidence of enemy's property at all. |

As respected the vessel, the narrative given by Captain Ashby, on p. 487
oath, in answer to the fourth interrogatory, was remarkably clear, and had internal indications of truth.

Moreover the libel is defective in form. It ought to specify for what offence supposed to be committed the vessel is claimed as prize of war; whether for breaking blockade or as enemies' property, or for what else? This generality of accusation belongs to no good system of law. It is 'the sending of the prisoner, and not withal signifying the crime laid against him,'—a matter which we have high authority to declare 'unreasonable.' Besides, there was no properly maintained blockade at Sabine. No blockaders could be seen for days and days. No nation has set itself more forcibly against paper blockades than the United States. Our natural duty and permanent interests are to support the rights of neutrals. We need not enlarge on a topic which was enforced with eloquence by counsel at this term in the case of *The Circassian*. Our

country has already given the world great lessons. In public law it remains for us to carry out the defence of neutral rights to their true dignity. This is the distinction which awaits us.

Lower views also would control this matter. We must not attempt to enforce doctrines against Great Britain and France that we are not willing to have applied to ourselves; nor while maintaining our present interest, teach instructions which will but return to plague the inventors.

Mr. Coffey, special counsel of the United States, contra.

The CHIEF JUSTICE delivered the opinion of the court.

It is not disputed that the cargo consisted of Texan products. Prior to shipment, then, it was enemy property.

The manifest of the cargo, found on the schooner when captured, shows that five hundred and ninety-seven bales of cotton, valued at thirty-one thousand dollars, and two hundred and ninety-one hides,
p. 488 valued at fifty-eight dollars and | twenty cents, were shipped at Sabine, in May, 1862, 'by the Andromeda, Culmell,' and consigned to Charles Caro & Co., at Havana. Of this cargo, Ashby, the master, says that ninety bales of cotton belonged to himself, and one hundred to Culmell, and that the remainder of the cotton, four hundred and seven bales, and all the hides, belonged to Caro & Co., who, he says, are neutral merchants, residing in Havana. Culmell says the same. Culmell was a rebel enemy, residing in Texas. Ashby left New Orleans in the Andromeda soon after the breaking out of the war, and from that time to the capture was in command of her, engaged in the Gulf trade, and the greater portion of the time with the rebel territory. He says of himself, that he was born in New York; lives in Louisiana; owes allegiance to Louisana and to the Confederate States, and is not a citizen of the United States. His acts and declarations prove him a rebel enemy. There can be no question, therefore, that the cotton, when it became the property of Ashby or Culmell, or both, was enemy property. There is nothing in the record to support the statements of those persons, as to the ownership of Caro & Co. On the contrary, there is much to discredit them. There is nothing in the manifest which shows any distinction of ownership; and it is proved that a part belonged to Ashby and Culmell. The cotton and hides appear to have been purchased with the proceeds of the merchandise brought by the Andromeda to Sabine; and there is nothing before us, except the bare statement of Ashby, that the schooner was chartered by them for Matamoras, which affords the slightest indication that Caro & Co. had any interest whatever in that merchandise; while the account of sales is not with them, but with 'schooner Andromeda and owners.'

Besides these facts, another circumstance is of much weight. It appears from the record that Caro & Co., though residing at Havana, only a hundred miles from Key West, where the District Court was held,

never appeared there during the proceedings in prize, never manifested any concern in the result beyond the mere signing of a power of | attorney, p. 489
authorizing Ashby to claim in their name. The court below very properly gave much consideration to this circumstance. In connection with the other facts mentioned, we think it fully warranted the conclusion, that no part of the cargo belonged to Caro & Co., and that the original enemy character of the whole of it remained unchanged at the time of capture.

The enemy character of the vessel is quite as clearly proved. She was originally the property of Ashby, a confessed rebel enemy, and, according to his statements, of others who, in the absence of any allegation to the contrary, must be presumed to have been, also, rebel enemies. By Ashby she was sold, as he asserts, to one Alleyn, said to have been a neutral residing in New Orleans. But there was no change of possession. Ashby remained in full and absolute control, both of her use and disposal, and afterwards sold her, under the asserted authority of Alleyn, to one Watson, alleged to have been a neutral residing in Havana. Still, however, there was no change of possession, control, or employment. There is not the slightest evidence that either of the alleged sales was real, except the unsupported statement of Ashby. That statement under the circumstances can carry no conviction with it.

The condemnation both of vessel and cargo seem to us, therefore, well warranted.

Were there any doubt, it would be removed by the destruction of papers proved to have been committed both by Ashby and Culmell, the real owners, as we think, of the schooner and her lading. Monsell, the steward, states that ' after the vessel was hove to, and before the officer came aboard from the Pursuit,' Culmell gave him a package of papers, which he believed to be newspapers, and told him to throw them over board, which was done. He says, that Ashby and Culmell were in the cabin together when this direction was given. Ashby admits that the charter-party of the voyage was destroyed before the capture, and that some papers were thrown overboard, he did not know what. Culmell confesses that the invoices and bills of lading of the | portion of the cargo p. 490
owned by himself, were thrown overboard. Now, when it is remembered that the only bill of lading in the record describes all the cotton as shipped by Edmonson & Culmell, the significance of this confession becomes manifest ; for if the bill of lading destroyed was, as it must have been, one of three of like tenor and date with the one found by the captors, then, if this statement be true, all the cotton was owned by Culmell. If, on the other hand, the statement be false, and the papers destroyed were other than as represented, then their destruction and the destruction of the charter-party authorize, under the circumstances, an absolute inference of enemy property, against both vessel and cargo.

We think the proof that the Andromeda and her cargo were liable to capture and condemnation for breach of blockade, equally clear; but, as we do not place our decision on that ground, we refrain from any remarks upon that aspect of the case.

No objection was made in argument to the sufficiency of the libel in the District Court. It would be enough to say of this objection, that the libel shows a case of prize, and that is sufficient for jurisdiction. All other exceptions are too late here. But the libel is beyond all exception. The rule is, that a libel in prize must allege generally the fact of capture as prize of war, and the libel in the record is in conformity with this rule.

The decree of the District Court must be affirmed.

NELSON, J. The proofs in the case, I think, fairly lead to the conclusion, that Ashby, the master of the Andromeda, was the real owner of the vessel, and that the sales by himself and others, in May, 1861, at New Orleans, to Alleyn, and by himself as attorney for Alleyn to Watson, at Havana, in March, 1862, were colorable; and, if Ashby was a resident and inhabitant of New Orleans, at the time of the capture of that port and city by our forces, on the last days of April, 1862, as seems to be assumed, there would be ground for claiming that he was entitled
p. 491 to the benefit and | protection of General Butler's proclamation of the 1st of May following; and, also, to the effect of that capture upon the status and property of the inhabitants of the captured city.[1]

The view I have taken of the proofs in the case, do not involve these questions.

Ashby left the city of New Orleans in this vessel soon after the breaking out of the war, and before the establishment of the blockade, and has never returned to it. During all this time and down to the seizure of the vessel, 26th of May, 1862, he has been in command of it, and engaged in the Gulf trade; and the greater portion of the time with the rebel territory. In answer to the first interrogatory, *in preparatorio*, he says, 'that he was born in New York; he now lives in Louisiana, and owes allegiance to Louisiana and the Confederate States; is not a citizen of the United States.' In answer to the fourth interrogatory, under an order allowing further proofs, he says that he left New Orleans with the vessel anticipating a blockade, that she might not become useless property, and that he did not expect to communicate with that city while the blockade continued. The proofs, as we have seen, show how he has been engaged during all this period.

On the above ground, I agree that the vessel was properly condemned in the court below, as enemy's property; and, also, the cargo, which the court have adjudged belonged to him.

DECREE AFFIRMED.

[1] See *supra*, The Venice; also, The Baigorry, preceding case. REP.

The Josephine.

(3 Wallace, 83) 1865.

1. The case of the *Baigorry* (2 Wallace, 474), deciding that the blockade of the *coast* of Louisiana, having no direct communication with the port of New Orleans by navigation, was not terminated by the proclamation of May 12, 1862, discontinuing the blockade of that port—affirmed.
2. If a vessel is found without a proper license near a blockading squadron, | under circumstances indicating intent to run the blockade, and in such a position as that if not prevented she might pass the blockading force, she cannot thus, *flagrante facto*, set up as an excuse that she was seeking the squadron with a view of getting an authority to go on her desired voyage. p. 84

By proclamation of President Lincoln, in April, 1861, a blockade was established along our whole Southern coast, then in possession of rebels against the authority of the Government. In the beginning of May, 1862, New Orleans and certain forts, Fort Jackson, Fort St. Philip, Fort Wood, Fort Pike, Fort Livingston, &c., passed, in consequence of the successes of Flag-Officer Farragut, into the possession of the Government, and from the 6th of May at latest, the possession of New Orleans became complete. On the 12th of May, 1862, the President issued his proclamation declaring that the blockade of the *port of New Orleans* should so far cease after the 1st of June, 1862, as that commercial intercourse with it might be carried on.

On the 28th July, 1862, nearly two months after the date last named, the Josephine was captured by the United States steamer Hatteras, on the high seas, and brought into Philadelphia, where she was libelled as prize. A certain Queyrouze intervened, claiming the cargo as the property of a French neutral, one Laplante, resident in France. He gave this history of the vessel: That she was loaded in New Orleans in February, 1862, with intention to proceed to Havana 'as soon as the port of New Orleans should be captured and opened by the forces of the United States;' that Laplante intended to ship the cargo at Havana in another vessel for Bordeaux; that he had written from Bordeaux to Queyrouze, at New Orleans, instructing him to load a vessel and keep vessel and cargo there until the port was opened by the United States authorities; that it had been expected that an attack would be made on the city by the Government forces, and, anticipating its capture, Laplante had deemed it expedient to have a vessel loaded ready to leave immediately upon the opening of the port; that Queyrouze obeyed the instruction, and the vessel, having been loaded, | remained at the wharf of New Orleans p. 85
until the investment of the forts below the city, in April, 1862; that it then becoming evident the Federal forces would capture the city, the rebel commander issued a proclamation commanding the destruction of all vessels lying at New Orleans, with the cotton, &c., on board, or in

store for shipment; to avoid which destruction the master of the Josephine caused her to be towed into Bayou Chené, to a point in the interior, and distant from New Orleans, where she lay concealed for a long time; that the master meantime endeavored to communicate the true character of vessel and cargo and destined voyage to the Federal authorities, that he might be brought within their protection and licensed to proceed to Havana, but was unable to do so because the rebel governor had prohibited it by his proclamation; that about the 25th July, 1862, it having been reported that the rebel commander of the district where she lay concealed designed to destroy the vessel, the master managed to escape with his vessel and cargo to the Gulf by some of the secret passages from the body of the country to the Gulf with which that region abounds; that he then sailed towards the mouth of the Mississippi, expecting to fall in with some of the United States blockading squadron and obtain the license to proceed on the intended voyage, but that on the 28th of July, 1862, while hauling round Ship Shoal, in full view of the light-house, she was captured.

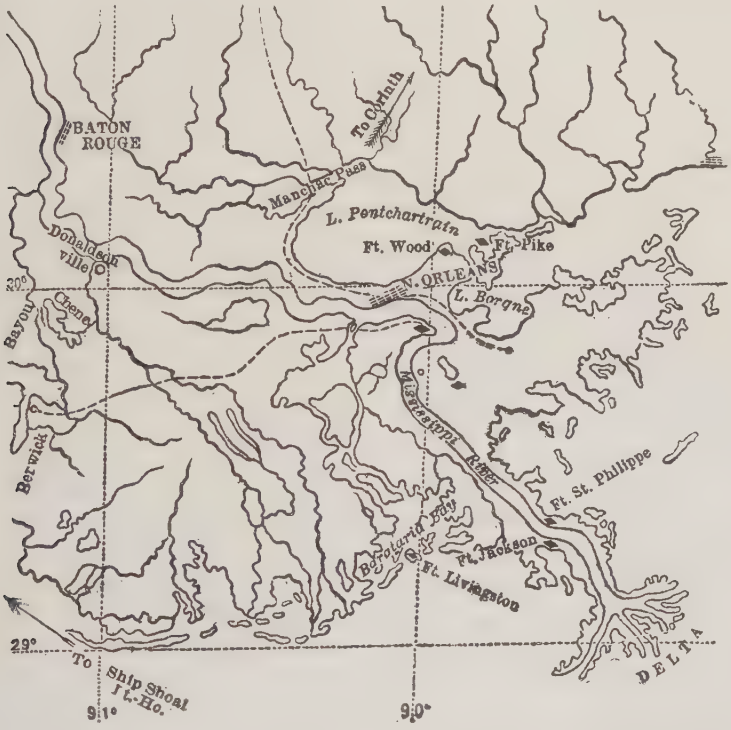
The master of the vessel, a resident of New Orleans, gave a different account; and swore in effect that the cargo belonged to other persons than Laplante, to wit: to certain Frenchmen, including one Sixé, resident and doing business in New Orleans; that he signed three bills of lading; that the cargo was deliverable to one Cabuzac, of Havana, to whom he was to go for orders, if he arrived there; that there were no papers of the kind inquired of on board; that is, no contract, agreement, license, protection, passport, or sea-brief from any government or officer thereof, but that he had a mail, containing letters, on board at the time of sailing,
p. 86 which he was instructed by Mr. Sixé to destroy in case | of capture, and which he threw overboard in pursuance of his instructions, and that he gave up no papers to the captors, having none; that he sailed from New Orleans four days before the capture of that city by the United States forces, and took his vessel to Bayou Chené; that he got to sea on the 27th of July, 1862, *and was bound to some port in Cuba or wherever he could get his vessel;* and that he was captured on the 28th of July, 1862, off Ship Shoal light-house, bearing east-northeast, *about ten miles* from the light-house, sailing under the English flag, without having cleared at any custom-house.

The mate, also a resident of Louisiana, corroborated the master, so far as his knowledge extended; stating that they sailed from Bayou Botey, Louisiana, and *were bound for Havana;* that they sailed under
p. 87 the English flag, and that a | little before the capture the captain threw overboard a bundle of papers. He presumed that the cause of the capture was the supposition that they had run the blockade.

Seacolor, a hand on board, said that the capture must have been because they had run the blockade.

The ship's papers found on board consisted only of some receipts for cotton, dated on the brig Josephine, from the 15th to the 19th of February, but without signature.

The map will show the peculiar character of the region in which the vessel was; a region which presents a reticulation of *bayous* interlacing with each other, in and through which it is possible to run from one portion of the country to another, in a manner rendering it almost



impossible to follow a course, which may be made devious to almost any extent.

Cargo and vessel were both condemned (no claimant appearing for the latter); and the case was now here for review; the main question considered by the court being whether the vessel had violated the blockade; though the condemnation was justified, also, on the ground of enemy's property. A motion had been allowed, also, in this court, owing to certain special facts, to allow some further proofs.

Mr. Assistant Attorney-General Ashton, and Mr. Coffey, special counsel for the captors.

1. However owned, the ship was clearly captured whilst violating

the blockade of the Louisiana coast, and was, with her cargo, liable to condemnation on that ground.

She left New Orleans, according to the master, four days before its capture by the United States forces, and when she was captured she was proceeding on the voyage then commenced. The blockade of that port was not then raised or relaxed, and there can be no question that, when captured, she was *in delicto* for that offence.

But, after she left New Orleans, the vessel lay for some months in one of the bayous, which form the secure retreats of rebel blockade-runners in Southern Louisiana, where, by the admission of Queyrouze, *she was*
p. 88 *within the rebel lines and* | *control.* She sailed out from those lines on the 27th of July, and was captured on the 28th, off the coast, under a false flag, *on her way to Cuba.* The master says, bound to some port in Cuba ; and the mate says, ' bound to Havana.'

At that time, the coast of Louisiana and its ports were blockaded, all being in rebel possession and control, except the port of New Orleans. The limited and conditional cessation of the blockade of New Orleans, allowed by the President's proclamation of 12th May, 1862, did not and could not apply to any other port of Louisiana, or to any portion of the coast in rebel possession and control. This was decided in *The Baigorry*,[1] a year only ago. That *coast* was, at the date of capture, in a state of actual and lawful blockade, and the Josephine was taken in the act of breaking that blockade.

No evidence is necessary to fasten on the Josephine knowledge of the blockade, since she was sailing from a blockaded port. In the ' *Prize Cases*,' [2] Mr. Justice Grier observed, that it is a settled rule in the law of nations, that a vessel in a blockaded port is presumed to have notice of the blockade as soon as it commences. But the claimant of this cargo must be charged with an actual knowledge, for he asserts, that at the time of capture the master of the Josephine was shaping his course for the blockading squadron. The offence was, therefore, complete.

In addition to its proved falsehood, the story of Queyrouze, that, at the time of the capture, the Josephine was seeking the blockading squadron to get a license or permission to proceed on her intended voyage, is subject to the further infirmity, that, if it were true, it would not relieve her from the penalty of blockade-running. No officer of the blockading squadron had any power to give such license or permission, and the law never accepts such an excuse from a vessel caught *in flagrante delicto.* It is of the class of excuses animadverted on by Sir William Scott, in *The Spes* and *The Irene*,[3] where vessels approached the mouth of
p. 89 a blockaded | river, with pretence of making inquiry as to the blockade,

[1] 2 Wallace, 474. [2] 2 Black, 677. [3] 5 Robinson, 77.

if they fall in with blockading vessels, but with intent to slip into port if they escape such vessels.

But the absurdity of the pretence set up by the claimant, of seeking the blockading squadron for a license, is proved not only by the master's contradiction of it in the statement that he was bound to Cuba, but by the facts that he was sailing under a false flag, and just before capture destroyed his papers. These acts, by the well-settled rules of law, stamp the voyage as fraudulent, and sustain the allegation of the libel.

2. The evidence proves that the cargo was owned by residents of New Orleans doing business there, and enemies of the United States. Sixé was one owner, and it having been by his instructions that the papers were destroyed, every presumption will be raised against him.

On both grounds, therefore, the decree condemning the cargo should be affirmed.

Mr. F. C. Brewster, of Philadelphia, contra, for the claimants of the cargo.

1. *Was the cargo liable for attempted breach of the blockade?* It is a self-evident proposition that, in order to justify a seizure and condemnation of property as prize of war for breach of a blockade, the blockade must in point of fact be existing at the time of the seizure. And where the blockade has ceased before the capture is made, the penalty for a breach of blockade is held to be remitted. Now, the proclamation of May 12 was a revocation of the notification of blockade of the port of New Orleans; and on the first day of June, 1862, the blockade of that port ceased. The Josephine was captured *nearly two months afterwards*. Inasmuch as the *delictum* is done away when the blockade ceases,[1] and as this is the rule even where the blockade existed at the time the vessel sailed from the port, but ceased or was raised before the capture was made, how can the vessel and | cargo in question be held liable to the penalty p. 90
for breach of blockade?

But if there was a breach of blockade, was it an intentional breach on the part of the owner of the cargo? The neutral must be chargeable with knowledge, either actual or constructive, of the existence of the blockade, and with an intent, and with some attempt to break it before he is to suffer the penalty of a violation of it.[2]

Though the cargo is always, *prima facie*, implicated in the guilt of the owner or master of the ship, its owner will, nevertheless, be permitted to give proof of the innocence of his intention. And, if this proof be satisfactory, the cargo will be adjudged to be free from the guilt in which the ship is involved, and be restored to its owner. In *United States* v. *Guillem*,[3] Taney, C. J., says: 'Even in the case of a cargo shipped as a mercantile adventure, and found on board of a vessel liable to

[1] The Lisette, 6 Robinson, 387.
[2] Fitzsimmons *v.* Newport Ins. Co., 4 Cranch, 185.
[3] 11 Howard, 62.

condemnation for a breach of blockade, although it is *primâ facie* involved in the offence of the vessel, yet, if the owner can show that he did not participate in the offence, his property is not liable to forfeiture.' And the late Chief Justice of this court did here but declare what had been previously said, in the case of *The Exchange*,[1] by Sir William Scott: 'Where orders had been given for goods,' said the great English judge, 'prior to the existence of a blockade, and it appeared that there was not time for countermanding the shipment afterwards, the court has held the owner of the cargo not responsible for the act of the enemy's shipper, who might have an interest in sending off the goods in direct opposition to the interest of his principal. And the same indulgence has been exercised where there was no knowledge of the blockade till after the ship had sailed, and the master, after receiving the information, obstinately persisted in going on to the port of his original destination.'

p. 91 In the present case, the owner of the cargo has established | the innocence of his intention. The instructions given to Queyrouze by Laplante show that Laplante never designed any attempt to break the blockade. On the contrary, he directed Queyrouze to keep the vessel and cargo at New Orleans until the opening of that port by the United States. Queyrouze followed these instructions, and detained the vessel after she had received her cargo, in port, until the act of the enemy deprived him of further control over her. The affidavit of Queyrouze is explicit upon these points.

With the guilt of the vessel (if there be such guilt) we have nothing to do in this case. We ask the court to discriminate between the vessel and her cargo.

To hold the owner of the cargo responsible in the way in which the captors wish, would be to put him completely in the power of the master; and, no matter how pure he may be, to make him bear the burden and suffer the penal consequences of a violation of the law which it was not in his power to prevent, and of which he never suspected the master would be guilty.

As to the master's destruction of the mail containing letters. The act of the master, in this respect, cannot operate to the injury of the owner of the cargo. For, 1st, the carrying of a mere private mail—that is, one which does not contain *despatches* of the enemy—will not subject either the vessel or her cargo to seizure and confiscation. And, 2d, even where the vessel carries despatches, and is seized in consequence thereof, the cargo will not share her fate where its owner or owners have not participated in the offence. It cannot be pretended, in the present case, that either Laplante or Queyrouze was guilty of any such offence. These letters were the only papers which the master destroyed. He destroyed no

[1] 1 Edwards, 39.

papers concerning the ownership of the cargo, for he had none such with him.

2. *Was the cargo enemy's property?*

It was the property of Laplante, a French subject, who resided in his native country, and never had even a temporary residence in the South. The affidavit of Queyrouze establishes this fact. The presumptions of the master of the | captured vessel upon this point, cannot stand against p. 92
the positive testimony of Queyrouze.

Nor can a hostile character be fastened upon it on account of the residence of Mr. Queyrouze, Laplante's agent, in New Orleans, while that city was in the possession of the rebels. For the rule is, that a neutral merchant may trade, in the ordinary manner, to the country of a belligerent, by means of a stationed agent there, and yet not contract the character of a domiciled person.[1]

The CHIEF JUSTICE delivered the opinion of the court.

It was held at the last term, by this court, that the blockade of the coast of Louisiana, having no direct connection with New Orleans by navigation, was not terminated by the discontinuance of the blockade of that port. In the cause now before us it is not very clearly shown by the evidence from what part of the coast the Josephine was coming when she was captured by the blockading steamer; but she must have been coming from some point west of Ship Shoal light, which is laid down on the Coast Survey charts as more than a hundred miles west of the mouths of the Mississippi. In this part, it seems, the coast may be reached from New Orleans, in some seasons at least, through the creeks and bayous which form a sort of network of water communication in Lower Louisiana, and allow more or less egress and ingress by small craft, to and from the Gulf. There does not appear to be any regular or usual communication with New Orleans from the Gulf by these ways. The Josephine succeeded in getting through, but the whole country through which she passed, and the coast where she came out, was in possession of the enemy; and she was captured by a blockader soon after she entered the Gulf.

It is impossible, under these circumstances, to hold that the blockade of that part of the coast was discontinued. That it was not discontinued in fact, is clearly shown by the evidence; and there was nothing in the occupation of the city, or in the proclamation revoking the blockade of the port | of New Orleans which could work the legal termination of p. 93
blockade of the coast which remained under hostile control.

We think that the blockade was in full force, and that the Josephine and her cargo were properly captured for violation of it. The appellant has filed an affidavit that the master of the Josephine was seeking the blockading fleet with the purpose of procuring a license to proceed on his

[1] The Anna Catharina, 4 Robinson, 107; The Indiana, 2 Gallison, 268.

voyage; but the statement of the master not only does not support the affidavit, but goes far to discredit it. Nor, indeed, could the alleged intent, if proved, avail the appellant; for it would not excuse the violation of the blockade.

This view makes it unnecessary to consider the questions made in the cause, respecting the ownership of the vessel and cargo, or the motion for further proof.

The decree of the District Court must be AFFIRMED.

The Thompson.

(3 Wallace, 155) 1865.

1. Prize courts properly deny damages or costs where there has been 'probable cause' for seizure.
2. Probable cause exists where there are circumstances sufficient to warrant suspicion, even though not sufficient to warrant condemnation.
3. These principles applied to a case before the court where a captured vessel was restored, but without costs or damages.

THE brig 'Thompson,' on her return voyage to Halifax from Nassau, was captured at sea with a cargo of 486 casks of turpentine and 81 bales of cotton, on the 16th of June, 1863, by the government steamer, the United States, and sent into the port of New York for adjudication. The capture was made on suspicion that the vessel had broken the
p. 156 blockade of our Southern coast, established by our government | during the rebellion, or had on board a cargo brought from a blockaded port, and transferred to her under circumstances justifying condemnation. One Clements, of Nova Scotia, in behalf of himself and of a certain Martin & Co., of Nassau, all parties being British subjects, put in a claim for the cargo; another British subject claiming as owner the vessel.

In favor of the claimants were the facts that the vessel when hailed had surrendered without opposition and submitted reely to search; that her papers were unspoiled, regular, and apparently fair; that the master and ship's company were British subjects, without any interest in either the vessel or cargo; that, so far as the face of things showed, the voyage commenced at Halifax and was to have ended there; that the vessel made no port between Halifax and Nassau on her outward voyage, nor any between the same places on her return, and that she was not near any port when captured; neither were any proofs given that the cargo was procured from a blockaded port by any person or persons on board of or interested in the prize vessel, or that it was the property of such person.

On the other hand was the fact well known that, during the rebellion, the subjects of Great Britain, actively engaged in attempts to break

our blockade, made the British island of Nassau an *entrepôt*, thus dividing their operations into two parts ; first running vessels from the blockaded port to this ' neutral ' island, and then transhipping their cargoes at it to other vessels, on which they were carried *as if* on a new voyage to some other, the originally real port of destination ; and so *vice versa*.

In the specific case before the court it was shown that a schooner, named the Argyle, from Wilmington, North Carolina, with a valuable cargo of cotton and spirits of turpentine, having escaped the vigilance of our fleet, had reached the harbor of Nassau ; that she did not discharge her cargo at the wharf, but hauled alongside the Thompson, which was at anchor, and that she transferred enough of her cargo to the latter vessel to load it. ' I was told,' said the cook of | the Thompson, p. 157 one witness who proved these facts, ' that the captain of the Argyle owned part of the vessel. He was a Southern man, from Wilmington.'

In addition to this it was obvious that Martin & Co., claimants of the cargo, were more or less in sympathy with the rebel cause and with the interests of blockade runners. They write to their correspondents at New York and Halifax as follows :

NASSAU, N. P., June 5, 1863.

MESSRS. WIER & CO., HALIFAX, N. S.

DEAR SIRS : We are in receipt of yours of 8th May ; contents noted ; your craft has not yet arrived. Will care for her when she does.

We have sent by this brig a cargo consisting of 486 casks spirits of turpentine and 81 bales of cotton. We desire it disposed of most to our advantage, either by shipping to England or America, as may appear. We shall write Messrs. Dollner, Potter & Co., of New York, immediately on arrival of the brig. You will telegraph to them and request their instructions. *We are happy to announce the arrival of the schooner Argyle with a full and valuable cargo, about* $42,000. The old thing is about being used up, her bottom being badly wormed. You will, of course, upon consultation with Captain Clements, and Dollner, Potter & Co., if they so decide it most to the interests of all concerned, sell at Halifax. *We do not like to have our property shipped on our account to the United States.* Captain Clements is the owner of one-half the cargo, being that brought out by ' Argyle.'

We are largely into steamers ; one leaves about the 10*th for Dixie* with valuable cargo ; will bring back 1200 bales cotton. Don't you want to invest three to five dollars in a good company. One company's stock is already worth 1200 per cent. in cost in gold.

We are doing quite well. Write often.

Yours, respectfully,
MARTIN & CO.

NASSAU, N. P., June 5, 1863.

MESSRS. DOLLNER, POTTER & CO., NEW YORK.

DEAR SIRS : We inclose herewith invoice and bill of lading of cargo on board brig ' Thompson,' consigned to Messrs. B. Wier | & Co. We p. 158

have instructed them to confer with you in regard to its disposition, as under our present situation we cannot ship our stuff to you direct. You will order it wherever you may, on consultation with them, agree is most to our interests. We have instructed them of this fact. The cargo is jointly owned by the owners of the A 1 boat.

We are happy to tell you the famous boat arrived ten days ago with 460 *casks spirits,* 90 *bales cotton, and* 50 *to* 60 *barrels No.* 2 *rosin in bulk, which we shall send to you as soon as a chance offers. We've also* 28 *bales on hand.* We will write you by steamer at once so as to go on Monday.

Yours truly,
MARTIN & CO.

The District Court for New York, where the libel was filed, considering that there was sufficient cause to bring the vessel and cargo in for adjudication, but not enough to condemn them, restored them both, but restored them *without damages or costs.* From this last part of the decree the claimants, who insisted on recompense in damages, severally appealed.

Mr. Donohue, in their behalf.

1. *As to the vessel.* No cause whatever existed, either at the time of seizure or trial, for her capture. All her papers were regular and fair; she was bound on a legitimate voyage, and in its due prosecution. Being a neutral, owing to us no allegiance, and taken on the high seas, she is entitled to recompense for her damages.

2. *As to the cargo.* It is clear that this cargo, if proved to have run the blockade, had reached the territory of a foreign nation, the home of one of the claimants, and was within his power in such neutral country. The mere fact of so having run the blockade, no more subjects it to forfeiture than does the same fact subject most of the cotton to be found on the high seas between Havana, Matamoras, Nassau, and European or American ports. Almost all such cotton has been run out from
p. 159 blockaded ports. In fact, every day shows the | arrival and entry of such cotton in our own ports. Blockade-running is not a crime. It is but an enterprise attended with peril. Neutrals have rights quite as good as belligerents. Because two nations have got into a quarrel—an absurd or wicked one perhaps—a third nation, which did nothing to bring it on, and cares nothing, perhaps, about it, except that it shall come to a conclusion, is not to have her commerce ruined. The restriction upon the rights of third parties must not be made *too* oppressive.

3. *As to both vessel and cargo.* By the nature of prize evidence, the claimant has but little means of proving bad faith, or showing bad faith in the captors; but, in this case, we submit that the seizure was a speculation, proving an intent to make the appearance of official duty cover an ulterior and interested motive. Extraordinary conduct, in such cases, is liable to severe censure.[1] When dealing with foreign nations, a frank

[1] Le Louis, 2 Dodson, 240.

and generous system is to be established. Foreigners will thus understand, as they have understood, that while we can and will protect and enforce our rights, we are not disposed to cover speculative efforts to get prize-money.

Finally. No amount of good intention or good faith can excuse a damage to a neutral, if the captor is mistaken in law as to his rights, and he has the means before him to ascertain the facts. In the Acteon,[1] where the vessel was in good faith, but without right destroyed, the court says :

' There are circumstances that may have afforded very good reason for destroying the vessel, and made it a meritorious act in Captain Capel, as far as his own judgment is concerned ; but these furnish no reason why the American owner should suffer. It does not appear that Captain Capel is charged with having acted with corrupt or malicious motives. If, as I believe to have been the case, he has acted from a sense of duty and of obedience to orders, I can have no doubt that he will be indemnified. I must pronounce for costs and damages, and this without imputation in the conduct of the captain.' ' If the | captor has acted from error p. 160
and mistaken duty, the suffering party is still entitled to full compensation (if not contributing to the loss).'

In *The John*,[2] the court says :

' Most certainly it is not sufficient for a party to plead ignorance as a legal excuse for making compensation to another, if his ignorance was vincible to himself at the time at which the transaction took place. In an unfortunate case like the present, the court would certainly be disposed to give the captain all possible relief ; but I need not add, that no relief is possible which cannot be given consistently with the justice due the claimant—that is the true rule.'

We respectfully submit, then, that, on well-settled principles, on evidence here, the court was wrong in withholding costs and damages from us, and the decree, in that respect, should be reversed.

Mr. Coffey, special counsel of the United States, contra. The evidence shows not that the court below leaned too much in favor of the captors, but that it went too far in favor of the claimants. It shows that the cargo of the Thompson consisted certainly in part, and probably in whole, of the cargo which had broken the blockade of the port of Wilmington on the Argyle ; that it was transhipped from the Argyle to the Thompson, without any landing whatever at Nassau ; that no change of ownership or possession of the cargo took place at Nassau ; that it never entered into the commerce or became part of the common stock of Nassau, and that its transfer to the Thompson for carriage to Halifax was part of the commercial venture which had its origin in Wilmington, and would have had its end at Halifax. The cargo brought from Wilmington to Nassau on the Argyle had *no commercial destination* to Nassau,

[1] 2 Dodson, 51, 52.

[2] 2 Dodson, 51, 339.

and that port can in no just commercial sense be called the end of its voyage from Wilmington. It was simply an intermediate port for transhipment on the way from Wilmington to Halifax. |

p. 161 The evidence discloses, moreover, the existence of an organization of blockade-breakers, represented at Nassau by Martin & Co.; at Halifax, by B. Wier & Co.; at New York, by Dollner, Potter & Co., and of which Clements, one of the claimants, is also an active partner. Adopting the familiar devices by which blockade-breakers sought to lessen the risks of their business, they divided their operations into two parts; first, running vessels from the blockaded port to Nassau, and, secondly, transhipping their cargoes at Nassau to other vessels, on which they were transported, as if on a new voyage, to Halifax, or some other port of real destination. The cargoes thus run out were to be sold at the port of real destination, 'upon consultation' of the parties interested, as they should 'decide it most to the interests of all concerned.' Of the vessels employed in this business, the Argyle is a sample of one class, and the Thompson of the other. They were as much parts of one commercial venture, common agents in a single voyage, beginning at Wilmington, and ending at Halifax, as are two locomotives which draw a train of cars over separate parts of the same railroad.

This cargo was shipped at Wilmington, with the intention of being at Nassau transhipped for further transportation to its market, *with unchanged ownership and control.* This *intention* in the original shipment furnishes the test by which a prize court will determine the *status* of the cargo when captured, if the cargo be taken on the voyage, prosecuted in execution of that intention.

There was thus sufficient ground even for condemnation. That both vessel and cargo were not condemned is evidence that the rights of neutrals are respected by our courts with sensitive regard.

But if the facts would not have justified condemnation, beyond question they justified the refusal of costs and damages. For they amount to proof of probable cause of capture; and this is the test by which, in doubtful cases, prize courts determine whether costs and
p. 162 damages ought to be | allowed or refused, and the question is one purely in the discretion of the court.

Mr. Justice DAVIS delivered the opinion of the court.

The District Courts of the United States have original exclusive jurisdiction in questions of prize, and are authorized to decree restitution in whole or in part when the capture is wrongful; and if it is made without *probable cause,* may order and decree damages and costs against the captors.[1]

[1] Glass *v.* The Sloop Betsey, 3 Dallas, 16; Act of June 26, 1812, § 6; 2 at. at Large, 161.

In time of war, the party who makes a seizure does not always act at his peril, and is not always liable to damages and costs if he fails to establish the forfeiture of the vessel. In fact, prize courts deny damages in case of restitution when there was probable cause for the seizure, and are often justified in awarding to the captors their costs and expenses.[1]

The question recurs, what, in the sense of the prize law, is meant by the terms '*probable cause*.' Chief Justice Marshall, in *Locke* v. *United States*,[2] held that the terms 'probable cause,' according to their usual acceptation, meant less than evidence which would justify condemnation, and in all cases of seizure had a fixed and well-known meaning; that they import a seizure made under circumstances which warrant suspicion. The court in that case were construing the 71st section of the collection law of 1799, which provided that the *onus probandi* should be on the claimant only where probable cause was shown for the prosecution. It was contended, that in order to justify seizure, the evidence must be such as, if unanswered, would justify condemnation. But the court held that such a construction would render totally inoperative the provision of the act of Congress. Judge Story, in *The George*,[3] which was a libel for damages for an alleged illegal capture, gave the same exposition of the terms 'probable cause' in matters of prize, and held that the capture of a ship was justifiable where the circumstances were | such as would p. 163
warrant a reasonable ground of suspicion that she was engaged in an illegal traffic. And such is the view held by all writers on maritime warfare and prize.[4] To adopt a harsher rule, and hold that the captors must decide for themselves the merits of each case, would involve perils which few would be willing to encounter.

Testing this case by these principles, was the District Court justified in decreeing restitution without costs and damages against the captors?

Does not the fact that the schooner Argyle did not discharge her cargo at Nassau, but hauled alongside of the Thompson, then at anchor, and transferred enough of her cargo to load the latter vessel, afford a reasonable ground of suspicion that there was concert between the vessels, and that the Thompson was purposely at Nassau to receive the cargo of the Argyle? And if further evidence was wanted to fix the character of the transaction, it is furnished in the letters of Martin & Co., who claim, in conjunction with Captain Clements, the ownership of the cargo, to Wier & Co., of Halifax, and Dollner, Potter & Co., of New York. These letters are written in a strain of high exultation. The Argyle has arrived with a cargo worth $42,000, in which Clements is interested, and Martin & Co. are sending steamers to Southern ports for return cargoes of cotton, in which ventures they want the participation

[1] The Apollon, 9 Wheaton, 372. [2] 7 Cranch, 339. [3] 1 Mason, 24.
[4] Story's Notes, by Pratt; The St. Antonius, 1 Acton, 113.

of Wier & Co. ' The famous boat ' with cotton, rosin, and casks of spirit has also reached port, and would be sent forward as soon as an opportunity offered. And, withal, Martin & Co., as if fearing evil, dread to have their property shipped on their account to the United States. Could any foreign merchant interested in lawful commerce wish to avoid the markets of this country ?

It is too plain for controversy, that all these parties were extensively engaged in illegal traffic with the States in rebellion, and that the business was profitable. And the whole evidence tends strongly to show that the
p. 164 voyage from Wilmington | to Halifax was a continuous one ; that there was no intention to terminate it at Nassau, and that the cargo of the Argyle was to be reshipped with unbroken ownership and control, so that it could be taken to a port which furnished a better market. If such was the intention, when the cargo left Wilmington, then its status is fixed, and the original guilt continued to the time of the capture, notwithstanding the stoppage at an intermediate port, and transhipment.[1]

A case of ' probable cause ' is clearly made out, and it is unnecessary to discuss the evidence with a view of showing whether the cargo or vessel should have been condemned, as the captors do not complain of the judgment of the court below.

The District Court committed no error in refusing to give the claimants damages and costs, as against the United States, or the captors.

DECREE AFFIRMED WITH COSTS.

The Cornelius.

(3 Wallace, 214) 1865.

1. Presumption of an intent to run a blockade by a vessel bound apparently to a lawful port, may be inferred from a combination of circumstances, as *ex. gr.* the suspicious character of the supercargo ; the suspicious character of the master, left unexplained, though the case was open for further proof ; the fact that the vessel, on her outward voyage, was in the neighborhood of the blockaded place, and within the line of the blockading vessels, by *night*, and that her return voyage was apparently timed so as to be there by night again ; that the vessel (though in a leaking condition, that condition having been known to the master before he set sail), paid no attention to guns fired to bring her to, but, on the contrary, crowded on more sail and ran for the blockaded shore ; and that one witness testified *in preparatorio* that the master, just before the capture, told him that he intended to run the blockade from the first.
2. Although in such cases it is a possible thing that the intention of the master may have been innocent, the court is under the necessity of acting on the presumption which arises from such conduct, and of inferring a criminal intent.

THE schooner Cornelius and her cargo were captured by the government vessel Restless, and condemned as prize of war by the District

[1] The Thomyris, Edwards, 17 ; The Maria, 5 Robinson, 365 ; The Maria, 6 Id. 201 ; The Charlotte Sophia, Id. 204, note ; The William, 5 Id. 385.

Court for the Eastern District of Pennsylvania for an attempt to run the blockade established by | our government, during the Southern rebellion, p. 215
of the port of Charleston, by putting into a neighboring inlet called Bull's Bay, from which Charleston was easily to be reached. Simonson, the master and owner of the schooner, and several claimants of the cargo, appealed to this court from that decree.

The facts, as assumed by this court from the evidence, were essentially these.

The master and claimants of the cargo were citizens of the United States. The vessel had been chartered by M. H. Vandyke for a voyage from New York to *Port Royal*—a place near Charleston, but in possession of the government, and, at the moment, open to trade—and back; to be terminated at Port Royal, *at the option of the charterer*. It was pretty clear that the cargo was entirely got up by Vandyke, was partly owned by him; and the remainder, if not owned, was controlled by him. Nothing appeared as to Vandyke's residence, his place of business, his character or standing in reference to the government and the rebellion, or where he was from the time the vessel left New York, which was June 15th, until he appeared at Port Royal, October 8th; two days before the vessel set out again for *some* point from that place. And although the case was open for further proof, and Vandyke made the test-oath to his own claim, the court was left in the dark as to these particulars.

A supercargo of his selection was placed on board, who had but recently come from the States in rebellion.

The vessel cleared for Port Royal, and reached that place July 1, 1862. She passed Bull's Bay on her voyage *to* this place in the *night*, and stood off and on all night until daylight next morning, being fired at twice by the Restless, one shell reaching the schooner, and she leaving the neighborhood only when daylight and the shells of the Restless made it necessary. She remained at Port Royal without unloading until October 10th, when she cleared for New York. She set off from Port Royal again at an hour which would have brought her opposite Bull's Bay *in the night;* but in consequence of her leaking a good deal, she did not come | in sight p. 216
of the blockading vessels watching that inlet till daylight of the 11th. About that time she saw the Restless, who fired at her twice; the shots falling short. She took no notice of these except to crowd on more sail. Acting-master Griswold, of the navy, was then despatched in an armed boat after her. His account was as follows:

'I proceeded towards Bull's Bay with all possible speed, hoping to reach the mouth of the narrow channel by which the schooner was trying to run the blockade; but she was too fast for us, for finding that the boat gained, *she set her mainsail and gaff-topsail*. As there was a strong breeze blowing at S.S.W., she went through the water at a furious rate, the pilot evidently well acquainted with the channel. On reaching

Bird's Island passage she entered it beautifully, and under all sail fairly flew through the water towards Harbor Creek; seeing which, I tried to cut her off by crossing the shoals close to the island (Bird's); but it was of no use. Suddenly, however, she took the ground, and by the time she floated again I was within a quarter of a mile of her; fired a rifle at her, *but no notice was taken of it.* She still, *under all sail,* tried to reach the main land; again she took the ground. Those on board finding that she was hard and fast, and the boat close on them, gave it up, and hoisted an American ensign in the fore-rigging, port side, union down. The captain said that the flag had been there all the morning, but we could not see it till close on her. It might have been there, however, as they could not have chosen a better place to have hidden it from us. On boarding her, I found the water up to the cabin floor; but on trying the pumps found that she could be kept free by pumping ten minutes in the hour.'

The steward, in his deposition, taken *in preparatorio,* stated that, ten or fifteen minutes before the vessel ran aground, the master told him that he had intended to run the blockade from the first.

The claimants of the cargo asserted, under oath, that they had never parted with the ownership of the goods; that they were sent on an honest venture to Port Royal, which had then been opened to trade; and that they had no intention to violate the blockade, and knew of none on the
p. 217 part of the | master. The master asserted, in the same way, that the bottom of his vessel became so worm-eaten, during his long stay at Port Royal, that she began to fill by the time he was fairly out to sea, and that with no intention to break the blockade he was compelled to run into Bull's Bay, and, in order to avoid expense of salvage, to beach his vessel, to save her and her cargo from sinking. The schooner was much worm-eaten, and leaking badly at the time she was beached. But the master had had her bottom examined, and knew her leaky condition before leaving Port Royal, though not, perhaps, the full extent of it; 'completely honeycombed,' said one witness; 'so much so that the mystery was how the vessel could float at all.'

The master, Vandyke, and the other claimants, were very explicit in their denial of any intention to violate the blockade.

Before making its decree of condemnation, the District Court submitted to two nautical experts, whom it invited to hear the case as assessors, the question, whether the facts of the voyage on which the vessel was captured were consistent with a destination in good faith from Port Royal for New York continuing without wilful deviation until the time of capture; and whether, if a wilful deviation occurred, it was under circumstances reasonably consistent with innocence of intention with reference to the blockade? The assessors reported it as their belief, that the deviation, under both these propositions, was made by the master with a fraudulent intent to run the blockade at Bull's Bay.

Mr. Ashton, Assistant Attorney-General, for the captors.

1. The decree below is to be taken, *prima facie*, as right.

Lord Langdale has said that, in an admiralty cause involving a mere question of fact, the Privy Council of England will not differ from the judge of the High Court of Admiralty and reverse his judgment, unless they can clearly come to a contrary conclusion.[1] The same rule has been acted upon | by this court in that class of cases; so that it may be regarded p. 218
the doctrine as well of the Supreme Court of the United States as of the English Privy Council, that in an admiralty cause, where the question proposed and decided below was one simply of fact, the appellant, as Mr. Justice Grier expresses it in one case, has all presumptions against him, and the burden of proof is cast on him to prove affirmatively some mistake made by the judge of the inferior court, in the law or in the evidence. The decree below will not be reversed upon the showing that there is a theory, supported by some evidence in the cause, on which a different decree might have been rendered.[2]

That this vessel had deviated from the line of the voyage which she was professedly pursuing, was a patent and conceded fact in the case. The only question, therefore, before the court below was, whether that deviation occurred with a fraudulent intention, on the part of those who controlled her navigation, to violate or evade the blockade. This was a question of fact. If the case could have been submitted to a jury, it would have been a question belonging to them to decide.[3]

But this case is peculiarly one in which the court should proceed upon the principle just stated. The fact was found against the claimants, not by the court alone, but by the experienced nautical assessors also. The duty performed by these gentlemen was like that frequently assigned by Lord Stowell to Trinity masters in cases involving similar nautical considerations. The proceeding in the case of *The Mentor*,[4] and in the case of *The Neutralitet*,[5] before Lord Stowell, was like the proceeding in the present case. The practice is a wise one, and should be encouraged by this court.

The nautical experts not only found the general fact, that there was a wilful deviation, with a fraudulent intent to violate the blockade, but they presented to the court a report | containing their views on all the p 219
facts connected with the navigation of the vessel, which entered into the determination of the great question on which the cause depended. This court will regard those facts as *conclusively* found by the assessors; and unless it should affirmatively appear that the inference drawn from them was unwarranted, will not disturb the report.

[1] The Christina, 6 Moore's Privy Council, 381.
[2] The ship Marcellus, 1 Black, 417; The Water Witch, Id. 500.
[3] United States *v.* Quincy, 6 Peters, 466; Lee *v.* Lee, 8 Ib. 50.
[4] Edwards, 207.
[5] 6 Robinson, 31.

2. It is an imperative legal presumption from the conduct of the master inside of the blockaded waters, ' where the law of war was the rule of navigation,' in wilfully and persistently disregarding the summons and warning of the blockading vessel, and proceeding in defiance thereof toward the enemy's coast, that the master intended to violate the blockade.

We hold the particular conduct of this vessel up as presenting in itself efficient ground of condemnation of both vessel and cargo.

We find no reported case precisely parallel to the present ; no case where there were so many signs of guilty intent on which the law could fix its presumption, as in this.

The case of *The Charlotte Christine*[1] was that of a neutral Danish vessel, proceeded against in August, 1805, on the ground of a breach of the blockade of the Seine. She was taken off Cape La Heve, which the master had made, according to his allegation, simply to get a pilot for Caen, that cape being the point where pilots usually plied for Caen. It appears that he had passed the English frigates with a signal for a pilot flying and without opposition ; but by his own admission, it also appeared that he had stood in within one mile of the shore *after he had perceived a pilot-boat to be coming out to him.* The facts, also, were developed by the evidence that the captured vessel continued to approach the shore after he had been hailed by the captors and had refused to bring to on the first notice. Now, what said Sir William Scott on this case ? His opinion, condemning the property, concludes as follows : |

p. 220 ' It is admitted that the master had seen the pilot-boat at twelve miles distant early in the morning ; that he had hoisted a signal, and perceived the boat to be coming off. What had he to do, then, but to have waited where he was, and where he had passed the frigates, as he says, without being considered to be in a suspicious situation ? Instead of this prudent and natural course of conduct, he continued to approach, and in defiance of the captor's boat, since it appears that he did not bring to until a gun was fired at him. The extreme imprudence of this behavior, and the great improbability that any person would so act but from some sinister motive, lays him under the unavoidable imputation of being engaged in an attempt to break the blockade.

The Gute Erwartung,[2] decided in 1805, is a further adjudication of Sir William Scott on the same principle. The vessel in that case was captured in the same waters and while professedly engaged in the same errand—taking a pilot for Caen—as the Charlotte Christine. The Gute Erwartung was a Lubec ship, sailing from Oporto with an asserted destination to Caen, captured twenty miles from Caen, and about that distance from Havre, a blockaded port. When taken, she was steering ' in a course direct to Havre, and with an intention (*not to enter Havre, as was expressly*

[1] 6 Robinson, 101.

[2] 6 Robinson, 183 ; affirmed on appeal by the Lords Commissioners, Id. Prefatory List.

averred, but) of going on close under the land for the purpose of taking a pilot on board to carry her to Caen.' Therefore, Sir William Scott says, 'if the situation of the vessel *alone* was to be considered, I should be disposed to acquiesce in this representation of his intentions, and to decree the vessel to be restored on payment of captor's expenses.' But that great judge proceeds:

'There is an ulterior circumstance that presents a more unfavorable aspect, which,' says he, 'places her, in construction of law, in the same situation which the other vessel (the Charlotte Christine, *supra*) had actually reached,' (viz., so near the enemy's coast as to expose the capturing vessel to the annoyance of the enemy's guns.) 'For, the master says, "the course | in which he was steering *would* have carried p. 221
him directly to Havre, and that he should have continued in that course, *though not into the port of Havre*, but that he should have gone close under the land, and have taken a pilot for Caen." Here, then, we perceive the same intention, and in the course of being pursued to the same illegal effect. *How can this intention be considered as innocent?* It is impossible that any blockade can be maintained if such a practice is allowed; that a vessel, under a destination to a port not interdicted, shall be at liberty to pursue her course in such a manner as must draw the cruiser employed in that service under the range of the enemy's batteries. It is at all times a matter of regret that the property of innocent persons should be exposed to hazard by the mere imprudence of their master; but it is impossible to relax the principle that the employer is legally affected by the acts of his agent. I am of opinion that the master in this case had declared an unlawful purpose, and was employed in pursuing it to an unlawful act; and that the ship and cargo must be pronounced subject to condemnation.'

The question in neither of these cases was as to the *de facto* innocence of intention. Conceding that it might in each case in fact have been innocent, the court condemned the vessel because the policy of the law of war required it. They were condemned by force of the rule which Lord Stowell, in another case,[1] thus states in his own clear diction:

'If the belligerent country has a right to impose a blockade, it must be justified in the necessary means of enforcing that right; and if a vessel could, under a pretence of going further, approach, *cy pres*, close up to the blockaded port, so as to be enabled to slip in without obstruction, it would be impossible that any blockade could be maintained. It would, I think, be no unfair rule of evidence to hold, as a presumption *de jure*, that she goes there with an intention of breaking the blockade; and if such an inference may possibly operate with severity in particular cases, where the parties are innocent in their intention, it is a severity necessarily connected with the rules of evidence, and essential to the effectual exercise of this right of war.' |

In *The Arthur*,[2] decided in 1810, this rule was again enforced to the p. 222
condemnation of both vessel and cargo. That American vessel was

[1] The Neutralitet, 6 Robinson, 31.

[2] Edwards, 203.

captured in the Ems, which the master had entered, as he alleged, for the purpose of procuring a pilot to the Yadhe.

On the authority of these cases, we affirm that it was the duty of the Cornelius to pursue that course of conduct which, under the existing circumstances, was natural for her to pursue, and which the presence of the blockading vessel rendered possible and easy—namely, to request assistance from the Restless, a man-of-war of her own country, who was not only present on the spot, but was actually in pursuit of her. We affirm, further, that it was the personal moral duty of every man on board of her, which he disregarded at the peril of heavy liability under the criminal law of the United States—for infringement of this blockade by any one owing allegiance to the United States is no less an offence than high treason—to keep as far away from the coast of South Carolina, and as near as he could, if the vessel needed assistance, to the blockading fleet; and, finally, we say that this court is entitled, in view of the conduct of this master, to presume, *de jure*, that he intended to violate the blockade.

3. Conceding that, under the circumstances of this case, there is no such absolute presumption of guilty intention, as we contend there is, under the English authorities, from the conduct of the vessel as described, then we affirm that the whole of the nautical evidence in the case disproves the innocence of the master's intention. The facts appear in the case as the reporter states it. We are willing that the court decide the question upon them alone. Our argument will stand as their reserve.

Mr. Gillet, contra, contended: That the decisions below were the very matters brought here for review, and that they were brought here in the exercise of an unquestionable right; that to give to them the effect
p. 223 sought would be the | *objectio ejus cujus dissolutio petitur*, the begging of the case, and render all appeal useless.

That the principles of the English admiralty, to the extent asserted by Mr. Ashton, had never been adopted here; that it would be unwise to adopt them; that they originated in the former character of Great Britain, that of a frequent belligerent, and for some years a constant one; and that it would be impolitic that a nation like ours, whose true interests were those of a neutral—the interests of peace and commerce—should ever embrace them.

That, finally, on the facts the case was not with the captors, for that there was really no proof at all of bad intention; that, however the case might be, if Port Royal had not been open to trade, the fact that it was open, and opened by the government, who thus *invited* all persons to trade to it, changed wholly the case. Persons could hardly trade to Port Royal, where the government urged them to go, and not sometimes

pass close to the blockading squadron ; and it would be very unjust to make parties suffer for being thus found there. The mate's denial, Mr. Gillet argued, was as explicit as possible ; not marked by any evasion or ambiguity, and should have conclusive weight in a case so obviously special.

Mr. Justice MILLER delivered the opinion of the court.

Notwithstanding the denial of the master, Vandyke, and the other claimants, of any intention to violate the blockade, we are of opinion that the vessel sailed from Port Royal with such intent, by running into Bull's Bay ; from which Charleston was easily accessible.

1. There are strong reasons to believe that the vessel was started from New York on a simulated voyage to Port Royal, with intent to run the blockade before reaching that place.

The supercargo is stated to have been found in New York after a recent residence and travel through a large part of the insurrectionary region. Of Vandyke, the controller of the whole cargo, and owner of part of it, and charterer of | the vessel, nothing is known as to his residence, his place p. 224
of business, his character or standing in reference to the government and the rebellion, or where he was, from the time the vessel left New York, June 15th, until his sudden appearance at Port Royal, October 8th. And although the case was open for further proof, and Vandyke makes the test oath as to his own claim, we are still left in the dark as to these particulars. The vessel passed Bull's Bay on her voyage to Port Royal in the night, and stood off and on all night until daylight next morning, being fired at twice by the Restless, one shell reaching the schooner, and only leaving when daylight and the shells of the Restless made it necessary. The steward, Sanford, in his deposition taken *in preparatorio*, says that ten or fifteen minutes before the vessel ran aground, the master told him that he had intended to run the blockade from the first.

2. The circumstances which prove the intent to violate the blockade in the return voyage are still stronger.

Her voyage was again timed so as to reach the entrance to Bull's Bay in the night, but owing to her leaking condition it was about daylight when she came in sight of the blockading force. About that time she passed the Restless, was fired at from that vessel several times, paid no attention to the fire except to put on more sail, was pursued by the boats of the Restless, and was run aground and captured five or six miles inside her station. The excuse set up by the master for this conduct, is his desire to beach his vessel and save her and her cargo, because she was in a sinking condition. It is shown by the testimony of the master himself, that he had her bottom examined, and knew its condition before he left Port Royal. It can hardly be believed from his own statement on that

subject, that he intended to risk her for the full voyage to New York when he started. Again, his obvious duty, and his safest course every way, was to approach the Restless, explain his condition, and ask for assistance. This duty he avoided, though he had full knowledge of the blockade, and when admonished by the shot from the Restless, he made
p. 225 every effort to escape by | crowding sail and running in toward the blockaded port. The excuse set up of a desire to save his vessel and cargo without subjecting her to salvage, would not be sufficient if the case stood alone on the facts connected with her voyage from Port Royal. In the language of Sir William Scott, in *The Charlotte Christine*,[1] although 'it is a possible thing that his intention was innocent, the court is under the necessity of acting on the presumption which arises from such conduct, and of inferring a criminal intention.' But when these are considered in connection with the facts already stated, tending to show an intention to run the blockade from the inception of the adventure, we entertain no reasonable doubt of the guilty purpose which carried her into Bull's Bay at the time of capture. Of course the attempt to violate the blockade was made in the interest of the cargo.

DECREE AFFIRMED.

The Cheshire.

(3 Wallace, 231) 1865.

1. The property of a commercial house, established in the enemy's country, is subject to seizure and condemnation as prize though some of the partners may have a neutral domicile.
2. The approach of a vessel to the mouth of a blockaded port for inquiry—the blockade having been generally known—is itself a breach of the blockade, and subjects both vessel and cargo to condemnation.

DURING the Southern rebellion, and our proclamation of a blockade of Savannah and other parts of the Southern coast being then notorious to the world, the ship Cheshire, with a miscellaneous and assorted cargo, was captured by a war steamer of the United States, on the 6th of December, 1861, off Savannah bar, eight or nine miles eastward of Tybee Light. She was taken to the port of New York and there libelled in the District Court as prize of war.

The evidence showed that the ship had been built in the State of Maine in 1848, her American name having been the Monterey; that she was owned by a house residing and doing business in Savannah, and was employed in the cotton trade to Liverpool; that in May, 1861, after the port of Savannah had been closed by the blockade set on foot under the President's proclamation of April 19, 1861, that house made a sale of her to Joseph Battersby, of *Manchester*, England; that her

[1] 6 Robinson, 101.

name was then changed, and in June, 1861, that she broke the blockade of Savannah, carrying a cargo of cotton to Liverpool.

Joseph Battersby, the purchaser, and who claimed her | here, was p. 232
then and at the time of the capture, a partner in business with William Battersby in *Savannah*, where one of them resided, the name of the firm being the same as that of their Manchester house, William Battersby & Co.

The *cargo* was claimed by both the Battersbys.

The ship was loaded at Liverpool and sailed directly for Savannah. The captain, however, had received instructions at Liverpool, dated October 8, 1861, ' to call off Savannah *merely for the purpose of inquiry*, but on *no account whatever* to attempt to enter a blockaded port.' ' In case the blockade is not raised proceed to *Nassau*, N. P., and *remain until you receive orders from Messrs. William Battersby & Co., of Savannah.*' The claim made in the case stated that this contingent destination to Savannah had been made in consequence of confident predictions, well known, by high officers of our government, that the rebellion would speedily be quelled ; and of the consequent presumption by the owners of the vessel and cargo, that the blockade would probably be raised by the time the vessel reached our Southern coast.

Some of the papers showed that Halifax, N. S., was a possible port of destination. The shipping articles represented the voyage as ' from Liverpool to Halifax, N. S., or Nassau, N. P.,' &c. The receipt of the shipping-master of the port of Liverpool for fees, dated 30th of September, 1861, declared it for Halifax. The master swore : ' On the voyage during which we were captured, the Cheshire was bound from Liverpool to Halifax, Nova Scotia, or Nassau. I was to speak the blockading squadron, and *if the ports were blockaded*, I was to go to Nassau, or Halifax.'

None of the papers of the ship, neither the clearance, bills of lading, invoices, nor manifest, which declared the ship bound for Nassau, nor the shipping articles, which declared her bound for Halifax or Nassau, contained the slightest intimation of a purpose under any circumstances to enter the port of Savannah.

The District Court, after argument and full consideration, condemned both vessel and cargo, on the ground that they were enemy's property and were captured in attempting to | break the blockade of the port of p. 233
Savannah. On appeal to the Circuit Court the condemnation was affirmed, and the case was now brought by the claimants before this court for review.

Mr. Edwards, for the claimants, appellants in the case ; Mr. Assistant Attorney-General Ashton, and Mr. Coffey, special counsel, contra.

Mr. Justice FIELD delivered the opinion of the court.

The facts established by the evidence in this case justify the condemnation, we think, of the cargo as enemy's property. No principle is more firmly settled than that the property of a commercial house, established in the enemy's country, is subject to seizure and condemnation as prize without regard to the domicile of the partners. The trade of a house of this kind is essentially a hostile trade, and the property employed in its prosecution is therefore treated as enemy's property, though some of the partners may have a neutral domicile.[1] Such trade tends directly to add to the resources and revenues of the enemy, and, as observed by Mr. Justice Story, 'there is no reason why he who thus enjoys the protection and benefits of the enemy's country should not, in reference to such a trade, share its dangers and losses. It would be too much to hold him entitled, by a mere neutral residence, to carry on a substantially hostile commerce, and at the same time possess all the advantages of a neutral character.'[2]

In this view it is unimportant whether the cargo was to be delivered to agents at Nassau, subject to the order of the house at Savannah, or be delivered directly from the Cheshire in the port of Savannah. In either case there was the trade with the house situated in the enemy's country.

The evidence in the case also establishes, we think, with equal clearness, the fact that the ship was attempting to break the blockade when
p. 234 captured. She was loaded for | Savannah; her cargo was intended for the branch-house of the shippers; she sailed directly for that port; the owners and officers of the ship were informed of the existence of the blockade before leaving Liverpool; and there was no act of our government, nor any act of the British government, nor had any event occurred in the progress of the war, from which any inference could be drawn that the blockade had ceased. The instructions to call off Savannah merely for the purpose of inquiry, and to proceed thence to Nassau upon ascertaining that the blockade was in force, have, under these circumstances, the appearance of a device to cover up a settled purpose to elude the blockade. They create a strong impression to that effect, and this impression is strengthened by an examination of the ship's papers. These papers contain no intimation of an intention to enter the port of Savannah upon any contingency. They show the destination of the ship to be either Nassau or Halifax; they indicate no contingent intention of going anywhere else. This concealment of the truth is itself a circumstance calculated to awaken strong suspicion as to the real designs of the ship; it is, in fact, *prima facie* evidence of fraudulent intention.

In the case of *The Carolina*,[3] where a cargo was taken on a voyage

[1] The Friendschaft, 4 Wheaton, 107.
[2] The San Jose Indiano and Cargo, 2 Gallison, 284.
[3] 3 Robinson, 75.

from Bayonne, ostensibly to Altona, but, in fact, to Ostend, the ship's papers represented that the cargo was to be delivered at Altona and Hamburgh ; and the court said, that if there had been any fair contingent, deliberative intention of going to Ostend, that ought to have appeared on the bills of lading ; for it ought not to be an absolute destination to Hamburgh if it was at all a question whether the ship might not go to Ostend, a port of the enemy, and that there was in this a fraudulent concealment of an important circumstance which ought to have been disclosed. Of the same purport are all the authorities.[1] |

Aside from these considerations the intention to break the blockade p. 235
is to be presumed from the position of the ship when captured. As already stated, she knew of the blockade when she sailed from Liverpool ; she had no just reason to suppose it had been discontinued ; her approach, under these circumstances, to the mouth of the blockaded port for inquiry was itself a breach of the blockade, and subjected both vessel and cargo to seizure and condemnation. The rule on this point is well settled, and is founded in obvious reasons of policy. If approach for inquiry were permissible it will be readily seen that the greatest facilities would be afforded to elude the blockade ; the liberty of inquiry would be a license to attempt to enter the blockaded port ; and that information was sought would be the plea in every case of seizure. With a liberty of this kind the difficulty of enforcing an efficient blockade would be greatly augmented. If information be honestly desired, it must be sought from other quarters. In the case of the *James Cook*,[2] the ship was captured at the entrance of the Texel, and the court applied this rule, observing that the approach of the ship to the mouth of a blockaded port, even to make inquiry, was, *in itself*, a consummation of the offence, and amounted to an actual breach of the blockade.

In every view, therefore, in which this case can be considered, we are of opinion that the ship and cargo were rightly condemned ; and we, therefore, affirm the

DECREE OF CONDEMNATION.

[See, as to the second point of this case—inquiry at a blockaded port—*supra*, *The Josephine*.—REP.]

[1] See The Margaretha Charlotte, 3 Robinson, 78, note 1 ; The America, Id. 36 ; The Neptunus, Id. 80 ; The Nancy Id. 82 ; The Phœnix, Id. 186.

[2] Edwards, 263.

The Sally Magee.

(3 Wallace, 451) 1865.

1. When a vessel is liable to confiscation, the first presumption is that the cargo is so as well.
2. The *primâ facie* legal effect of a bill of lading, as regards the consignee, is to vest the ownership of the goods consigned by it in him.
3. Ownership thus presumptively in an enemy is not disproved by a test affidavit in prize, stating generally that the goods consigned had been purchased for their consignee contrary to his instructions, and that he had rejected them; and that this appeared 'from the correspondence of the parties,' which the affiant (an asserted agent of the alleged true owner) swore that he 'believed to be true,' but which neither he nor any one produced, or accounted for the absence of; and where, though two years had passed between the date of the claim and that of the decree, the consignors and asserted owners, who lived at Rio Janeiro, had not manifested any interest in the result of the prize proceedings, which were at New York, nor, so far as appeared, had been even applied to in the matter.

   [N.B. The court, referring to *The Merrimack* and *The Frances* (8th Cranch, 317 and 354), admitted that the case would be different had the allegation as to purchase by the consignor, in contravention of orders and subsequent rejection by the consignee, been sufficiently proved; and proved affirmatively, as it was requisite to prove it.]
4. A lien on enemy's property, set up under the act of March 3, 1863, to protect the liens of loyal citizens upon vessels and other property which belonged to rebels, is not sufficiently proved by the test-oath of the party setting up the lien and asserting it without any specification as to date of origin, 'from correspondence' with the parties and 'copies of the invoice of the cargo' sworn
p. 452 to as 'believed to be true;' the correspondence | and copies not being produced, nor their absence accounted for. The principles asserted in the preceding paragraph of the syllabus apply here.
5. Capture at sea of enemy's property clothes the captors with all the rights of the owner which subsisted at the commencement of the voyage; and anything done thereafter, designed to incumber the property or to change its ownership, is a nullity.
6. Cases of prize are usually heard, in the first instance, upon the papers found on board the vessel, and the examinations taken *in preparatorio;* and it is in the discretion of the court thereupon to make, *suâ sponte*, or not to make, an order for further proof. But the *claimant* may move for the order, and show the grounds of the application by affidavit, or otherwise, at any time before the final decree is rendered; and such an order may also be made in this court. The making of it anywhere is controlled by the circumstances of each case. It is made with caution, because of the temptation it holds out to fraud and perjury; and made only when the interests of justice clearly require it.

APPEAL from a decree of the District Court for the Southern District of New York, condemning as *enemy's property* the bark Sally Magee and her cargo, captured during the late rebellion; the question before this court being, however, only as to the cargo; the condemnation of the vessel not being appealed from. The case was thus:

Before the commencement of the rebellion, the vessel had been engaged in trade between Richmond and South America. Her outward

voyages were usually to Rio Janeiro. She left Richmond upon her last voyage on the 2d of January, 1861—that is to say, about three months before the outbreak of our civil war[1]—with a cargo of flour and domestic goods, shipped by Edmund Davenport & Co., of Richmond, and consigned to Charles Coleman & Co., at Rio. She took in a return cargo of coffee and a small parcel of tapioca. Four bills of lading were given. Three of them were to Coleman & Co.; two for consignments to Davenport & Co.; the third for a consignment to Dunlap & Co. The other bill of lading was to Moore & Co., of Rio, and was for a consignment also to Dunlap & Co. *All the goods were to be delivered at Richmond.* |

The vessel sailed from Rio for Richmond on the 12th of May, 1861. p. 453
When forty-five days out from Rio, and before any intelligence of the war had reached her, she was captured as prize, and sent to New York, where both the vessel and cargo were libelled in the District Court. Upon the return of the monition, on the 23d of July, 1861, two claims, both made by Fry, Price & Co., of New York, were interposed relative to the cargo. In July, 1863—*two years after the proceedings on prize were instituted*—both the vessel and cargo were condemned, the latter having been appraised at the considerable sum of $69,000.

One of the claims made by Fry, Price & Co., was in behalf of Coleman & Co., and embraced that part of the cargo (1500 bags of coffee) which was consigned to Davenport & Co. It stated among other things that Coleman & Co., as factors and commission merchants, at Rio Janeiro, 'had been directed to purchase and ship for the account, and to the consignment of Davenport & Co., coffee, if procurable, *at not over ten and a half cents a pound;* that Coleman & Co. did make the shipment of the cargo above claimed to the consignment of Davenport & Co., but that by the invoice thereof it appeared that the said purchase was not made at or within the said limit; for which cause, Davenport & Co. had refused to receive it as purchased for their account, or otherwise than on the account of the shippers, Coleman & Co., and as agents of necessity for them; and that the said Davenport & Co. had authorized Fry, Price & Co. to receive the same in their place and behalf as aforesaid.'

The claim was supported by the affidavit of Mr. Price of this firm. It alleged 'that the facts above stated' were stated 'from the correspondence of the parties, which he believes to be true.' *None of the papers referred to were put in evidence by annexing them to the affidavit or otherwise.*

The other claim related to the residue of the cargo—about 2000 bags of coffee—consigned to Dunlap & Co., of Richmond. It was not denied that this was enemy's property. The claimants alleged, however, *a lien.* Their claim | stated that Dunlap & Co. owed them a balance of p. 454
$35,326, and upwards, and 'that they were authorized and directed by

[1] The firing on Fort Sumter was upon the 12th April, 1861.

that firm to receive and sell the coffee, and apply the proceeds, as far as necessary, to the payment of the debt, and to hold the balance for the account of the debtor firm.' Like the first claim, this one was supported by the affidavit of Mr. Price, who swore that he stated the above facts '*from correspondence with the firm of Dunlap & Co., and copies of the invoices of the cargo, and believed the same to be true.*' But as in the case of the preceding claim, *neither correspondence nor copies were produced.*

It is necessary here to say that, by act of Congress of March 3, 1863,[1] 'to protect the liens upon vessels in certain cases, and for other purposes,' it is provided, that where any vessel or other property shall be condemned in proceedings authorized by certain preceding acts (against rebels), the court making the decree of condemnation shall, *after condemnation* and before awarding the distribution of the proceeds of confiscated property, provide for the payment out of the proceeds, of any *bonâ fide* claims by any loyal citizens intervening in the prize proceedings, which shall be duly established by evidence.

Mr. Lord, for the claimants: The vessel having been captured before any intelligence of our civil war begun had reached her, the question of intent to break the blockade of our Southern coast—so usual a question of late in the court—does not arise.

The question, as to the claim set up for Coleman & Co., is one of enemy's property purely; and as to the other, a question of the protection, under the statute of March 3, 1863, of a *lien* held by loyal citizens of New York. In both cases we suppose that the *onus probandi* is with the captors.[2]

I. *As respects the claim in behalf of Coleman & Co.*

p. 455 The question is one simply, as we have said, of the enemy | *status* of the claimant; a proprietary question, whether at the time of capture the cargo was the property of neutral or of enemy? Now,

1. A foreign correspondent making a shipment on the order of his principal, but without the limits of the order, does not vest the property in the principal without some act of adoption, or waiver by him. Here there was none.

The doctrine has been uniform in the prize courts, that although goods are ordered by a correspondent, yet if they are subject to rejection by the principal, the property does not pass unless accepted. Several cases to this effect—the *Merrimack* and others—may be seen in 8th Cranch.[3]

In *The Frances*,[4] one of them, a British agent in Great Britain, in orders given before the war to purchase goods for the claimants, an

[1] 12 Stat. at Large, 762; referring to certain prior acts.
[2] The ship Resolution, 2 Dallas, 22.
[3] Pages 317, 325, 328, 354.
[4] Ib. 354.

American house in New York, made purchases, but deviated from the orders. He said : ' I have exceeded in some articles, and have sent you others not ordered. I leave it with yourselves to take the whole of the two shipments, or none at all, as you please.' The bill of lading and invoice were expressed to be on account of *the American consignees*. Marshall, C. J., speaking of the consignment in excess of orders, says :

' This, then, is a new proposition, on which the American correspondents are at liberty to exercise their discretion. They may accept or reject it, and until they do accept it, the property must remain in the enemy shipper.'

So here it remained in the Brazilian shipper until the deviation from orders should have been accepted or waived.

2. The claim and test affidavit were sufficient. The claimants at Rio could not be expected to verify the claim personally ; the verification by an agent is all that can be asked. The Richmond consignees, from living in Virginia, could not be expected to make the verification. The devolution of the rejected purchase to a competent agent, is in all respects proper, and the only way the claim could be put in. |

The test affidavit with the claim is sufficient. The office of the p. 456
test affidavit is not to supply the details of evidence, but to aver the simple fact of proprietary interest. The oath annexed is as efficient as any detail of circumstances or correspondence. An order for further proof is made by the court *ex motu suo* only. It was not competent to the claimant to apply for it. The affidavit is always the summary proof, and, until impeached by further proof, is decisive in prize proceedings.

There is no ground to doubt the truth of the affidavit, by reason of any want of statement in the bills of lading or papers, that the property is neutral. At the time of the last communication to Rio from the United States there was no war, blockade, or contraband, which the ship's papers could refer to. Nor could the correspondence between the parties embrace any letters from the consignees respecting this shipment. There is no ground of any suspicion of suppression or unfairness as to documents ; and on the claim, not impeached, and on the ship's papers, the coffee of Coleman & Co. should not have been condemned, but restored to the claimants.

The decree of condemnation precluded all claim to offer further proof. Until the decree, no further proof could be admitted, even if the matters alleged were material, or were capable of an explanation consistent with the right to restoration.

II. *As to the claim of Fry, Price & Co., as lien creditors of Dunlap & Co.*

By the doctrines of prize, a creditor having a mere lien, not being a direct proprietary interest accompanied with possession, cannot be heard in a prize proceeding. Whatever be his right, the captured property must be condemned. But the act of March, 1863, introduces certain new and benignant, though just features into the code of prize.

It is submitted that this act should be largely construed in favor of creditors. Also, that no condemnation creates any rights to interfere
p. 457 with the payment of any debts which | could be specifically enforced. It overrides condemnations, and has the operation of an actual amnesty as to honest creditors. The cases, indeed, were innumerable where property became subject to condemnation during the rebellion, which to have swept from honest creditors would have been most unjust and cruel; and the principle, the spirit of the act in all particulars, is as applicable, notwithstanding its precise language, to prize condemnations as to any others.

Mr. Speed, A. G., and Mr. Coffey, contra.

Mr. Justice SWAYNE delivered the opinion of the court.[1]

When a vessel is liable to confiscation, the first presumption is that the cargo is in the same situation.[2] The bills of lading in the case are in evidence. The goods were consigned to parties living in Richmond. This vested the ownership in them. Such is the legal effect of a bill of lading as regards the consignee, unless the contrary is shown by the bill of lading itself or by extrinsic evidence.[3] Upon the proofs there was clearly a *primâ facie* case for the condemnation of the entire cargo.

We will consider, first, the claim in behalf of Coleman & Co.

In our opinion the law was correctly laid down by the counsel of the appellants. If the facts alleged are made out by the proofs, the claimants are entitled to restitution. The cases referred to in 8th Cranch are in point, and are decisive upon the subject. General principles, in the absence of these authorities, would have led us to the same conclusion. When an agent exceeds his authority, the principal is not bound unless he ratifies. Upon being informed he must exercise his election. Whatever may be the motives of his decision, the result is the same. His acceptance or rejection determines his rights and obligations.

p. 458 Here, if Coleman & Co., as factors, bought the coffee at a | price exceeding the limit prescribed by Davenport & Co., and the latter, upon learning the fact—no matter when that was, or what the circumstances—repudiated the purchase, the title of the factors thereupon became absolute, and none passed to the principals for whom the purchase was made.

[1] Nelson, J., not having sat; having been indisposed.
[2] 2 Wheaton, Appendix, 24. [3] Laurence *v.* Minturn, 17 Howard, 100.

It remains to consider how far the facts alleged by the claimants are sustained by their proofs. The burden of the affirmative rests upon them. The language of the test affidavit implies clearly that the correspondence to which it refers was in their possession. It is not produced, and its absence is not accounted for. The court is asked to take the averment of the affiant as to its existence and construction, in place of the correspondence itself. This no sound system of jurisprudence would tolerate. If the correspondence was not in the possession of the claimants, doubtless that and other evidence was at the command of Davenport & Co.

Between the filing of the claim and the time when the decree was rendered more than two years elapsed. There was time to communicate repeatedly with Rio. Coleman & Co. could have furnished full testimony. If the facts were as alleged it would have been conclusive in their favor. Nothing is produced from them. It does not appear they were applied to, nor does it appear—large as is the amount involved—that they have done any act, or manifested any interest touching the controversy since it began. We can draw but one inference from these facts. It is, that if the evidence were produced, it would be fatal to the claim.

The appellants insist that an order of the court, made *suâ sponte*, after the hearing upon the preparatory evidence, was indispensable to enable them to introduce any additional testimony; that it was not competent for them to apply for such an order; and that none having been made, the test affidavit should have been held sufficient. Such is not the rule as to further proof. If it were, the claimants would not be excused for withholding the correspondence, or not accounting for its absence when the test affidavit was submitted.

Cases of prize are usually heard, in the first instance, upon | the papers p. 459
found on board the vessel, and the examinations taken *in preparatorio;* and it is in the discretion of the court thereupon to make or not to make the order. But the claimant may move for the order, and show the grounds of the application by affidavit, or otherwise, at any time before the final decree is rendered. Such an order may also be made in this court. In one case affidavits were submitted in support of the application, and the order was made after the cause was heard.[1] In another case a parol statement was submitted by the counsel for the claimant before the hearing, and the consequences were the same.[2] The result is always in the discretion of the court, and that discretion is controlled by the circumstances of each case. The order is made with great caution, because of the temptation it holds out to fraud and perjury. It is made only when the interests of justice clearly require it. In the

[1] Wheaton on Captures, 284–5. [2] The London Packet, 2 Wheaton, 372.

case before us no application was made in the court below, and none in this court.

If it be said the court erred in not making the order without an application, and without a showing, we cannot assent to the proposition. The state of the evidence warranted the decree; and, as the case was presented, there was no reason to believe that further evidence would benefit the claimants.

The other claim relates to the coffee consigned to Dunlap & Co., of Richmond, and it is not denied that this was enemy property. The claimants allege a lien. The claim states that Dunlap & Co. owed them a balance of upwards of $35,326, and that they were authorized and directed by that firm to receive and sell the coffee, and apply the proceeds, as far as necessary, to the payment of the debt, and to hold the balance for the account of the debtor firm.

The same affiant made the test affidavit, as in the other case. He referred, as in that case, to an important correspondence, and failed to produce it. The same remarks apply upon the subject. It is to be
p. 460 inferred, also, that the | letters were written after the shipment of the cargo, and, indeed, after the capture. In either case the arrangement was made too late to have any effect.

The ownership of property in such cases cannot be changed while it is *in transitu*. The capture clothes the captors with all the rights of the owner which subsisted at the commencement of the voyage, and anything done thereafter, designed to incumber the property, or change its ownership, is a nullity. No lien created at any time by the secret convention of the parties is recognized. Sound public policy and the right administration of justice forbid it. This rule is rigidly enforced by all prize tribunals. The property was shipped to the enemy. It was diverted from its course by the capture. The allegation of a lien wears the appearance of an after-thought. It strikes us as a scheme devised under pressure, to save, if possible, something from the vortex which it was foreseen inevitably awaited the vessel and cargo.

The claimants invoke the aid of the act of March 3, 1863. It cannot avail them. The facts relied upon as fundamental to the claim are not established to our satisfaction. It is, therefore, unnecessary to consider the subject of the proper construction of the act, or the effect of the facts, if they had been sufficiently proved.

DECREE AFFIRMED.

The Bermuda.

(3 Wallace, 514) 1865.

1. No trade honestly carried on between neutral ports, whether of the same or of different nations, can be lawfully interrupted by belligerents; but good faith must preside over such commerce: enemy commerce under neutral disguises has no claim to neutral immunity.
2. Neutrals may establish themselves, for the purposes of trade, in ports convenient to either belligerent; and may sell or transport to either such articles as either may wish to buy, subject to risks of capture for violation of blockade or for the conveyance of contraband to belligerent ports.
3. Goods of every description may be conveyed to neutral ports from neutral ports, if intended for actual discharge at a neutral port, and to be brought into the common stock of merchandise of such port; but voyages from neutral ports intended for belligerent ports are not protected in respect to seizure, either of ship or cargo, by an intention, real or pretended, to touch at intermediate neutral ports.
4. Neutrals may convey to belligerent ports, not under blockade, whatever belligerents may desire to take, except contraband of war, which is | always p. 515 subject to seizure when being conveyed to a belligerent destination, whether the voyage be direct or indirect; such seizure, however, is restricted to actual contraband, and does not extend to the ship or other cargo, except in cases of fraud or bad faith on the part of the owners, or of the master with the sanction of the owners.
5. Vessels conveying contraband cargo to belligerent ports not under blockade, under circumstances of fraud or bad faith, or cargo of any description to belligerent ports under blockade, are liable to seizure and condemnation from the commencement to the end of the voyage.
6. A voyage from a neutral to a belligerent port is one and the same voyage, whether the destination be ulterior or direct, and whether with or without the interposition of one or more intermediate ports; and whether to be performed by one vessel or several employed in the same transaction and in the accomplishment of the same purpose.
7. Destination alone justifies seizure and condemnation of ship and cargo in voyage to ports under blockade; and such destination justifies equally seizure of contraband in voyage to ports not under blockade; but, in the last case, ship and cargo not contraband are free from seizure, except in cases of fraud or bad faith.
8. Circumstances, such as selection of master, control in lading and destination, instructions for conduct of voyage, and other like acts of ownership by an enemy, may *repel*, in the absence of charter-party or other explanation, presumptions of ownership in a neutral arising from registry or other documents, and will warrant condemnation of a ship captured in the employment of enemies as enemy property.
9. Spoliation of papers, at the time of capture, under instructions and without explanation by production of the instructions, or otherwise, warrants the most unfavorable inferences as to employment, destination, and ownership of the captured vessel.

Appeal from a decree made by the District Court for the Eastern District of Pennsylvania, regarding the steamship Bermuda and her cargo, captured during the rebellion by the government war-vessel Mercedita, and sent into Philadelphia, and libelled there and proceeded on in prize.

The allegations of the captors were, that the vessel was enemy's property, and with her cargo—largely composed of munitions of war—had been intending, either directly or by transshipment, to break the blockade, then established by our government, of the southern coast, and that both she and her cargo were, on these and other grounds, subject to be captured and condemned.

The case was interesting, partly from the value, larger than common,
p. 516 of the ship and cargo, but more particularly | from the fact, that while many and strong indications of a general sort pointed at once to the truth of the allegations of the captors, blockade-running had been brought, by our adventurous English kinsfolk, during the Southern rebellion, to so much of a science; true purposes, by the aid of intermediate neutral ports of their own, had come to be so very well disguised; the final general destination of the cargo in this particular voyage was left so skilfully open, and the capture was so confessedly in neutral neighborhoods, that it was not quite easy to prove, with that certainty which American courts require, the intention, which it seemed plain must have really existed. Thus to prove it, required that truth should be collated from a variety of sources, darkened or disguised; from others opened as the cause advanced, and by accident only; from coincidences undesigned, and facts that were circumstantial. Collocations and comparisons, in short, brought largely their collective force in aid of evidences that were more direct.

The history of things, as they appeared on one side and on the other respectively, was in substance thus:

On the captor's side. The vessel herself had been built at Stockton-upon-Tees, in 1861. In August of that year, a certain Edwin Haigh made the declaration of ownership required by the British Merchants' Shipping Act of 1854. He described himself as a 'natural born British subject,' of Liverpool, 'and *entitled to be registered* as owner;' swearing, according to the usual form, that no other person '*qualified* to be owner of *British* ships is entitled as owner to any interest whatever.'[1] E. L.
p. 517 Tessier, a South Carolinian, | was stated to be master of the ship. It was not denied that Haigh was a British subject. On the day after her registry, as appeared by a document from the Liverpool customs, entitled, 'Certified Copy, Transaction subsequent to registry,' Haigh executed

[1] It was, perhaps, a noteworthy fact that, in most of the affidavits, &c., about the ownership, the language was of a sort that did not necessarily involve an unqualified assertion of real and equitable ownership, as distinguished from the legal title and ownership on the registry, which the British statutes, like our own, largely look to. One of the documents, for example, said: 'Your memorialist is a British subject and sole *registered* owner' of the ship Bermuda, &c. In another, Mr. Haigh styles himself, 'shipowner and merchant.' In another, he thought that certain contraband things found on board should not affect his position '*as* owner of the vessel,' &c. &c.

a power of attorney, or 'certificate', as it was called, to Allan Stuart Hencle and George Alfred Trenholm, both *of Charleston, South Carolina,* merchants, 'jointly or severally to sell the ship, at any place out of the kingdom, for *any sum he or they may deem sufficient,* within *twelve months* from the date of the certificate.' There was no evidence that this power had ever been revoked or returned.

Trenholm was a member of the firm of Frazer, Trenholm & Co., of Liverpool, a firm which, with its branch house, John Frazer & Co., of Charleston, was one of the firms most largely engaged in rendering aid to and sustaining the rebellion, by fitting out blockade-runners, and corsairs to injure American commerce. They were also the disbursing agents of the rebel confederation in England, and they had several vessels, the Ella, Helen, Herald, Economist, Albert, and others, forming a sort of 'line' between Liverpool and Charleston, which carried on blockade-running, with the aid of agents at Bermuda and Nassau, N. P., intermediate British neutral isles. The firm was composed of Frazer & Trenholm, as also of a certain Prioleau, one Welsman, and a *J. R. Armstrong*; the first four being South Carolinians; and the last, alone, a British subject.

In possession of the registry and power of sale already mentioned, the Bermuda sailed for Charleston, then a port in rebellion and under blockade, in August, 1861. For some reason not stated, and inferable only, she ran into Savannah instead—a port also in rebellion and under blockade—running out again and back to Liverpool in the autumn of that year. Her master was now changed. Captain Tessier was transferred to the Bahama, which afterwards became notorious in the United States as having carried armament to the rebel corsair Alabama, sunk off the coast of Normandy by the United States ship of war Kearsarge. A certain Westendorff was put on the Bermuda. The British | statutes, however, p. 518
requiring a recommendation to authorize a license to any one as captain, *Frazer, Trenholm & Co.,* in December, 1861, declared that they had known Westendorff for ten years; that he served under an experienced ship-master, sailing out of *Charleston,* and that he had afterwards commanded one of *their* ships. Among these was the Helen, a blockade-runner. Westendorff was, accordingly, legally licensed by the British merchant authorities captain of the Bermuda.

By the practice of the British ports, it is usual to indorse the address of the captain licensed on the back of his certificate of license. This indorsement on Captain Westendorff's ran thus:

'*Address of bearer*: Messrs. Frazer, Trenholm & Co., Liverpool.'

Being brought round from West Hartlepool, on the east coast of England, the Bermuda now prepared for another voyage. Ostensibly it was to Bermuda. The cargo consisted of various things, some of which

would have been useful enough at Bermuda, but which—cut off as the place had been by the blockade from commerce—were supremely desired at Charleston; such as tea, coffee, drugs, surgical instruments, shoes, boots, leather, saddlery, &c. Among the dry-goods were five cases of lawns, each having a card upon it, representing a youth gallantly mounting a parapet, and bearing onward the 'FLAG OF THE CONFEDERATE STATES,' which in all its colors was spread to the breeze.

There were found, also, several cases of military decorations, &c.; epaulettes for all grades; stars for the shoulder-straps of officers of rank; bugles, crossed swords and cannons for different sorts of cap fronts; swords for staff and line officers; *chapeaux de bras*; embroidered wreaths, 'without U. S. on;'[1] various sizes of military buttons for coats and vests; some with the palmetto tree; belts with the same designations; other buttons and belts with the letters S. C.; L.;[2] T.;[3] &c., and
p. 519 with eagles surrounded by *eleven* | stars; palmetto trees embroidered on blue cloth, &c.; sash buckles, with the arms of Georgia, of South Carolina, &c.

Among the cargo were several cases of cutlery, which was stamped as

'Manufactured expressly for John Treanor & Nephew, Savannah, Ga.'

It embraced a variety of articles, stamped with portraits and legends, thus:

'JEFF. DAVIS,
OUR FIRST PRESIDENT.
The right man in the right place.'

Others presented a military figure, emblazoned

'GENERAL BEAUREGARD.
He lives to conquer.'

Others represented a bull running after a man, with soldiers chasing; and over the bull this motto:

'ON TO WASHINGTON! BULL RUN.'

The blades of these were stamped,

'Courtney & Tenant, Charleston, S. C.'

Several cases of double-barrelled guns were found, stamped as

'Manufactured for J. E. Adger, of Charleston.'

There was also a large amount of munitions of war; five finished Blakely cannon in cases, with carriages; six cannon—some cast, some wrought—not in cases; some thousand shells, varying from seven to a hundred and twelve pounds each, and fuses for them. Three hundred barrels, seventy-eight half-barrels, and two hundred and eighty-three

[1] So labelled. [2] Louisiana? Texas, or Tennessee?

quarter-barrels of gunpowder, seven hundred bags of saltpetre ; seventy-two thousand cartridges, two and a half million percussion caps, two cases of Enfield rifles, twenty-one cases of swords, marked N. D. (navy department ?), seven cases of pistols, and a variety of like or accessory things ; in all about eighty tons weight. In addition to these was a large amount of army blankets, army cloths, kerseys, vulcanized cloth, with fifteen hundred yards of adhesive plaster ; these last large enough to be invoiced at $62,500.

Numerous letters of friendship and business were found | in the vessel p. 520
from people abroad to different persons in the rebel States, Mrs. Trapman, Mrs. Trenholm, Mrs. Rose, Mr. T. M. Hencle, Mr. C. F. Hencle, Mr. John Hencle, &c. ; also five numbers of the Times, sent by some person in England to his friend in the South ; also a book by one Spence, published by Richard Bentley, New Burlington Street, London, showing the bad effects which the American Union had had on the national character and policy, and that ' secession ' was ' a constitutional right ; ' several passages being marked *in margine*, apparently as if to invite attention specially to them.

A few memoranda, also, were found aboard ;—requests apparently from persons in Charleston to Captain Westendorff to buy things for them in England, and bring them through the blockade. A part of one may serve for illustration ;—from the perceptiveness with which harmonic colors are prescribed and the dainty ' size ' and ' quality ' of the gloves—' $6\frac{3}{4}$,' ' best '—obviously a lady's :

' CHARLESTON, 18 .

2 pair ladies' kid gloves, silver-gray color.
2 ,, ,, ,, tea color.
2 ,, ,, ,, ashes of rose, light and dark.
} Best quality. Size $6\frac{3}{4}$.
2 ,, ,, gaiters, *best kid*, stout soles, *soft* upper, $3\frac{1}{2}$ full.
1 ladies' parasol, best silk, color drab or ashes of rose.
$\frac{1}{4}$ pound black sewing silk, fine. If it can be had of mixed colors, get $\frac{1}{2}$ pound of best qualities.
1 pair lady's scissors, ordinary size, and some needles of best make.

M. S. D.

☞ *Get the best quality of everything.*'

One of the memoranda, which like the other was a lady's, and contained an order for gloves,—' dark-colored kid '—concludes :

' May God bless Captain W., and protect him, and bring him in safety back to his family, church, and friends, is our prayer for him.'

On the vessel were several persons, called in various letters | ' govern- p. 521
ment passengers ; ' being in fact ' artists ' sent from Scotland. An account of them was given in certain letters found on the vessel : some addressed to a certain Mr. Morris, ' *lithographer*,' in Charleston, who it

appears had safely run the blockade not long before. In different parts they ran thus :

STATIONERY DEPARTMENT,
80 BISHOPSGATE WITHIN, 26 LEADENHALL STREET,
LONDON, February 12, 1862.

DEAR MORRIS :

I was very much pleased to hear that you managed to escape the vigilance of the Yankee vessels in getting into Charleston, and from the accounts I have heard, should think you had a *very narrow escape.*

A commissioner (Major Ficklin) from the Confederate government has been over here, and has sent a lot of printers and engravers, and presses, and paraphernalia complete, which he obtained from Scotland. He served me very shabbily and ungentlemanlike. I had many interviews with him, and gave him all necessary information ; furnished him with a list of requirements, compromising myself with several workmen, and put myself to many inconveniences. He admitted my price being proper and correct, and led me to believe he would give me his order, but *having got out of me all he could,* he then intrusted the order with another house. I hardly think that fair, after promising to trust me with it and within a few weeks of its execution.

We, in England, do not think the North can hold on much longer, the financial state being such as to induce us to hope that two or three months will settle your present deplorable state.

We inclose our catalogue, which may guide you ; and we make and can buy paper of all kinds as well as any London house ; so could execute your order for foolscap loan paper, with watermark C. S. A., as shipped you, at 42*s.* per ream double, equalling two reams single.

Trusting soon to hear of you, I am yours,

C. STRAKER.

This ' lot of printers and engravers ' which Major Ficklin had obtained in Scotland, embarked, under the charge of one George Dunn, on the
p. 522 Bermuda, on this voyage, the whole | party being entered on the crew list as common sailors. They appeared to have taken their ' paraphernalia complete ' with them. There were at least 26 boxes marked P. O. D. (post-office department ?), with immense numbers of ' Confederate States ' postage stamps ; ' printing ink for postage stamps ; ' copper-plates with 400 dies for printing at each impression 400 rebel postage stamps ; also 200,000 letter envelopes ; some ' American-shape,' ' official blue,' &c. ; many reams of fine white bank-note paper, watermarked

C. S. A.

intended obviously for ' Confederate States ' bank notes or bonds—' loan-paper '—but which having gone with the captured vessel to the port of Philadelphia, and there sold in great quantities, happens, by a singular coincidence of things, to furnish the reporter with the identical paper on which he writes this narrative.

AGREEMENT FOR FOREIGN-GOING SHIPS.

Name of Ship.	Official Number.	Name of Master.	Date of Agreement.
Bermuda.	42,608	C. W. Westendorff.	22 February, 1862.

Signature of Crew.	Age.	Where born.	Ship in which he last served.	In what capacity engaged.	Time at which he is to be on board.	Amount of wages per calendar month, share, or voyage.	Shipping master's signature or initials.
John Dempsey,	15	Dublin,	Demetrius, London,	Boy,	25 Feb.	1 0 0	T. Cushman
Thomas Willott,	16	Liverpool,	Holyhead, Bath,	Asst. cook,	25 Feb.	1 10 0	T. C.
Peter Johsen,	22	Copenhagen,	Northern Crown,	A. B.,	25 Feb.	2 10 0	T. C.
John Richardson,	25	Derham,	Bermuda, Liverpool,	Fireman,	25 Feb.	4 0 0	T. C.
Wm. Geo. Embleton,	29	Richmond,	First Voyage,	O. S.,	25 Feb.	0 10 0	T. C.
John Isard,	52	Charleston,	First Voyage,	O. S.,	26 Feb.	0 1 0	T. C.
John Julius,	19	Charleston,	First Voyage,	O. S.,	26 Feb.	0 1 0	T. C.
Joel Poinsett,	18	Georgetown,	First Voyage,	O. S.,	26 Feb.	0 1 0	T. C.
Henry Arthur,	19	Savannah,	First Voyage,	O. S.,	26 Feb.	0 1 0	T. C.
&c., &c.,	&c.,	&c., &c.,	&c., &c.,	&c.,	&c.,	&c.,	&c.

So among the persons that embarked on the Bermuda, at Liverpool, were certain gentlemen residents of Charleston, but perfectly well known in circles of gentility and pleasure, both North and South, before the rebellion began. Among these, as was noted by counsel, was the late amiable Mr. John Julius Pringle, a gentleman of education and fortune, resident in South Carolina during the winter, but at Newport, Rhode Island, in summer, and in that agreeable resort of taste and fashion by many pleasingly, and with regrets, remembered. Mr. Pringle, with his two sons, Mr. Joel Poinsett Pringle and Mr. John Julius Pringle, Jr., with Mr. Arthur Huger, all of whom the rebellion found enjoying themselves in Europe, and whose unquestionable wish and purpose was to return to the South, were entered on the shipping list as common sailors, and by disguised names. The nature of a shipping list and some of the very unnecessary regulations under which as ordinary seamen these gentlemen in consideration of one shilling per month came, appear in truest relief, perhaps, by presenting the instruments themselves. The gentlemen's names on the list are in italics. |

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REGULATIONS FOR MAINTAINING DISCIPLINE,

Sanctioned by the Board of Trade, in pursuance of the Merchants' Shipping Act, 17 & 18 Vict. c. 104.

No.	Offence.	Amount of fine or punishment.	Shipping master's signature or initials.
1	Quarrelling, or provoking to quarrel, .	One day's pay.	All adopted. T. Cushman.
2	Swearing, or using improper language .	One day's pay.	
3	Carrying a sheath-knife, . . .	One day's pay.	
4	Drunkenness. First offence, . .	Two days' half allowance provisions.	
5	,, Second offence, . .	Two days' pay.	
6	Not attending divine service on Sunday, unless prevented by sickness or duty of the ship, ...	One day's pay.	
7	Interrupting divine service by indecorous conduct, ...	One day's pay.	
8	Not being cleaned, shaved, and washed on Sundays, ...	One day's pay.	
9	Washing clothes on a Sunday, . .	One day's pay.	
10	Secreting contraband goods on board, with intent to smuggle, . .	One month's pay.	

Of the ship's real company, the master, Westendorff, the first mate, and the master's brother (calling himself and shipped as a hand, but acting as clerk) and three seamen, were citizens of South Carolina; and the second mate, the carpenter, and cook belonged to other States in rebellion. |

There were forty-five bills of lading, of which thirty-one were for goods shipped by Fraser, Trenholm & Co. The whole of the cargo was shipped under their direction; and according to the bills of lading it was

to be delivered at Bermuda, '*unto order or assigns.*' No consignees were named on the bills.

Several of the persons connected with the ship or otherwise, and who were examined *in preparatorio*, appeared to regard her as owned by Fraser, Trenholm & Co. Thus the chief engineer, when thus asked to whom she belonged, answered: 'To the best of my knowledge, Fraser, Trenholm & Co. are the owners.' Heenan, a fireman, said: 'I have understood that Fraser, Trenholm & Co. are the owners.' Noble, another fireman: 'The owners of the captured vessel, to the best of my knowledge and belief, are Fraser, Trenholm & Co.' And Pierson, a third one, said: | 'At Liver- p. 525
pool, it was the common talk that Fraser, Trenholm & Co., of Liverpool, owned the captured vessel.' A letter of one of the mates, found on board and written to some friend,[1] seemed to speak of them in the same way. So, too, Tessier, the old captain, writes to Westendorff, his successor, thus:

STOCKTON-ON-TEES, 20th Feb., 1862.

DEAR WESTENDORFF:

Will you do me a favor? Opposite the Brumley Moore Dock wall there is a boot-maker of the name of Warner. As you are passing by, will you have the kindness to step in and inquire whether a pair of sea-boots I ordered have been sent to the office of *our owners*. If they have, please request Mr. Griffiths, head-porter of *Frazer, Trenholm & Co.*, to forward them to me.

Captain Mitchell must have had a trying time since he sailed. I hope he kept her well to the southward after leaving the channel. To take the H. [erald?] across the Atlantic, at this season, will require some working.

With sincerest regards, I remain ever yours respectfully,

E. L. TESSIER.

Certain *correspondence* between Fraser, Trenholm & Co. and their branch house, &c., was specially relied on by the captors to show that the British subject Haigh was not the owner, and that the firm of Fraser, Trenholm & Co. was. Thus it appeared that, on the 16th of January, 1862, the Liverpool house of Fraser, Trenholm & Co. write to the Charleston branch, John Fraser & Co., that they had despatched the ship 'Ella' with a cargo to Butterfield, Bermuda, and that she would be followed by the steamer Bermuda with goods.

They now write as follows:

['Ella.']

LIVERPOOL, 23d January, 1862.

MESSRS. JNO. FRASER & CO., Charleston.

DEAR FRIENDS: Referring to our respects of 16th inst., we now hand inclosed bills lading of the cargo per ship Ella, and copies of invoices. |
These goods are all shipped by our friends here; *but the disposition* p. 526

[1] *See infra*, pp. 1565-6. '*I have seen the owners.* All fudge what he told me. *Mr. Preleau (principal man) came up to me,*' &c.

of them there is left entirely to you, and in any market to which you may please to direct them.

The bills of lading are indorsed to your order, or that of your authorized agent. Captain Carter is an intelligent shipmaster, and we believe a good man of business; any communication for him, if you do not find it expedient to send an agent to Bermuda, should be sent under cover to Mr. N. T. Butterfield, Hamilton, Bermuda. Captain Carter is instructed to proceed to Bermuda, and there await your instructions. The ship is now in the river ready for sea.

The 'Albert' sailed yesterday for Nassau, and will proceed, after landing her cargo, to Rio for a cargo of coffee, with which she is to return to Nassau *for orders.*

We remain yours, very truly,
FRASER, TRENHOLM & Co.

['Bermuda.']

LIVERPOOL, 28th February, 1862.

MESSRS. JNO. FRASER & Co.,
(or their authorized agent,)
Hamilton, Bermuda.

DEAR SIRS: The letters we have written by this opportunity, with invoices and bills of lading of the cargo of the ship, are very full in every particular, and we think will greatly facilitate the delivery *and also the transshipment,* should this be determined upon. *We think that care should be taken to prevent the loss of any of the invoices or bills of lading;* but should this *unfortunately* happen, duplicates can be furnished hereafter, which would, however, involve much delay and great inconvenience in the delivery of the goods; and without the invoices there would necessarily be much embarrassment in effecting sales.

In case of there being an opportunity of sending the letters forward with the invoices and bills of lading, *we cannot too strongly impress upon you the adoption of the most certain means of preventing any of them falling into improper hands.*

Yours, truly,
FRASER, TRENHOLM & Co.

On the 1st of April, 1862, the Charleston house write to Butterfield
p. 527 thus, having by previous letter informed him of | their being advised that the Ella was despatched, and that she would be *followed by the Bermuda.*

CHARLESTON, April 1, 1862.

DEAR SIR:

We suppose that the steamer Bermuda may be with you ere this; and the ship Ella.

We will thank you to request the masters to act as follows, viz.:

Captain Westendorff to take in the tea and other light articles per Ella (if he has room for them), and proceed to Nassau, reporting himself, on arrival there, to Messrs. Hy. Adderly & Co.

Captain Carter to keep in his cargo and wait further orders from us. They will reach him, we think, very shortly.

Yours respectfully,
JNO. FRASER & Co.

N. T. BUTTERFIELD, Esq.,
Hamilton, Bermuda.

Butterfield, who received this letter nineteen days after it was written, immediately sent it to Captain Westendorff, at St. George's. Westendorff acted on it at once. He took the new articles aboard, and the artists having got out from his ship—though he refused, as involving him in too great a responsibility in the face of his new orders, to deliver to Dunn the printing-presses and working apparatus consigned with the party under him to Bermuda—he proceeded from St. George's towards Nassau, on the 23d of April. Mr. Pringle and the other South Carolina gentlemen were aboard. On the 27th the vessel was captured. He had arrived at Bermuda on the 19th March, and was accordingly there about five weeks. His cargo was not touched while there.

Among the papers taken on board the Bermuda was an unfinished letter, without signature, and apparently written by an engineer of the Bermuda to a friend (another engineer it was said) at Stockton-upon-Tees. It ran thus:

LIVERPOOL, WELLINGTON DOCK, February 16, 1862.

MR. A. GRAY, Stockton-on-Tees:

We are all the talk of Liverpool at present, taking in those large rifled cannon (without cases), and large lots of ammunition | and materials p. 528
of war. In American circles our fate is discussed pretty freely; they have us taken, imprisoned, and hung already. Our Hartlepool friend, Mr. Detective Maguire,[1] has got a job *here* again; is regularly to be seen on the quay, to take a look of what is going on board. They put the custom-house inspectors to a great deal of trouble, because they are coming down every day, opening boxes and cases—to satisfy J——. The inspector said to me yesterday, that there existed great jealousy on account of our cargo; but fortunately they cannot stop us. We are on a lawful voyage; people won't believe it here; they are bound to think we are for running the blockade again.

Our tender left yesterday; *don't be at all surprised we have got a tender;* they bought a light draft-boat at Dublin, used to run the mail once, called the Herald; length, 280 feet: deep water line, 10 feet; light, 5½; side-width, 225; horse, nominal, used to press up to 28 pounds; got her boilers stayed, strengthened, and soforth; strains up to 20 pounds now; average speed, 18½ knots per hour; razeed all her lower cabins, to make cargo space; shipped crew for twelve months, for some port or ports south of Mason and Dixon's line. Three captains on board; one an Englishman, nominal; another, an experienced coast pilot from the Potomac to Charleston; another, ditto, ditto, from Charleston to the San Juan River in Texas. If the Yankees reach her, they are smarter than I give them credit for. *She awaits our arrival in Bermuda;* goes *first into Charleston*, though, *to see about the stone fleet.* Don't tell Tessier I gave you the information; he'll write straight to the owners, and tell them I am a traitor, and blabber out secrets; I know him. I have seen

[1] This was obviously a person employed by the United States, to see what vessels were engaged in giving aid to the rebellion. He had been watching, it appears, the vessel before she was brought round to Liverpool.—REP.

the owners; all fudge what he told me. Mr. Preleau (principal man) came up to me; shook hands; said was glad to see me. I said, I hope I didn't incur your displeasure by remaining in the Bermuda. *Answer.* Not at all.

The record showed that, after his arrival at Bermuda, Mitchell, captain of the Herald, drew a bill on Fraser, Trenholm & Co., at Liverpool,
p. 529 in favor of Westendorff, captain | of the Bermuda, for £258, to be charged to the account of the Herald; showing that Captain Westendorff advanced to the Herald that amount.

So to one Farrelly, a person on the Bermuda, and apparently a candid, though not a much educated witness, testified:

'At Bermuda there was a steamer called the Herald, which we understood was intended to run the blockade; but the captain who brought the steamer out from England refused to run it. The talk at Bermuda was that there were other captains on board the Herald, and that they were trying to get one of these captains in command. It was also the talk that the Herald was connected with our ship.'

At the time of the capture, and after the vessel was boarded, the captain's brother, by his order, threw overboard two small boxes and a package, which he swore that he understood contained postage-stamps, and a bag, which he understood contained letters, *and which he was instructed to destroy in case of capture.* Mr. Huger also destroyed a number of letters, which he swore were private letters, intrusted to him by Americans in Europe.

Such essentially was the case on the captors' side.

On the other side the case existed thus:

As to the place where the vessel was captured.—When captured, the Bermuda was not far from the eastern coast of Great Abaco Island, an English colony, and steering along the coast, *not* in the route to any of *our* ports, but in a south-westwardly direction, and, as was *alleged*, between Abaco and Eleuthera (another English island), to New Providence (Nassau), a third English colony. She was captured within sight of British land, within the range of the Abaco light. The distance was from five to seven miles from the shore; exactly how far was not sufficiently shown. The British flag was flying at the time of the capture, and was not hauled down until the prize was taken a distance of twenty or thirty miles farther out to sea. There was, perhaps, but slight evidence, |
p. 530 certainly slight *direct* evidence, to show that her *immediate* destination was to any blockaded port. Being on the eastern side of the Bahama group, she was, in a straight line, as was *said at the bar*, 160 miles from Florida, 410 miles from Savannah, 430 miles from Charleston, and 480 miles from Wilmington, N. C. The Mercedita was cruising near the Abaco entrance to Nassau; and it was asserted, and perhaps rather

made to appear, that orders had at one time been given, or rather, maybe, understood to be given, to capture the Bermuda *wherever found* on the high seas between England and the United States. A previous conclusion, derived from our agents in England and from trustworthy evidence, quietly collected by orders of our government, had possibly existed on the part of the government that the vessel was built for the very purpose of running the blockade.[1]

As to ownership.—Haigh, who had been desirous to make the British government interpose, as for a capture within neutral territory, and who had made claim in the court below as owner, in a paper prepared by him to induce the British government to interfere, swore that *he* was 'the sole registered owner' of the vessel; that she was bound to Bermuda, with instructions to deliver her cargo there to one N. T. Butterfield, and to ship a homeward cargo for Great Britain; that it was '*not* intended that she should attempt to break the blockade,' &c.; that, on the arrival of the ship at Bermuda, the consignee of the cargo was desirous that it should be carried to Nassau, and made an arrangement with the master to have it carried with some additional cargo, the particulars of which he, Haigh, had not been informed of.

So Captain Westendorff, in previously asking to make claim to the vessel and cargo for the parties whom he asserted were interested, swore that Haigh was 'the true, lawful, and *bona fide* owner' of the vessel, and that no other person was owner of or *interested* in her; and that the vessel had no destination either for herself or cargo when she left Liverpool, except for Bermuda in the first instance, and ultimately | for Nassau; p. 531
that he, the captain, was directed to receive instructions and place himself under the care of N. T. Butterfield, of Hamilton, in the island of Bermuda named;[2] that the cargo was shipped and owned by British subjects and on British account, and not for or on account of or for the use of any person in the insurrectionary States; and that, if restored, it would belong to British subjects, and not to them; and that neither vessel nor cargo, nor any part of it, was intended for the insurgents; and that the vessel did not intend to violate the blockade anywhere. *His affidavit was as direct and full as possible.*

So Armstrong, the British partner in the firm of Trenholm, Fraser & Co., by writing filed, swore that 'the said firm, acting as agents for Mr. Edwin Haigh, owner of the British ship Bermuda, procured for her from various shippers a full cargo;' that the steamer sailed hence for Bermuda; that the cargo laden here was intended to be discharged at Bermuda or Nassau; and that a return cargo had been provided by her consignees at Nassau; that the general management of the steamer had been placed in the hands of his firm 'by the owner,' but that no

[1] See *supra*, p. 1565. [2] See, however, the letter of instructions, *infra*, p. 1571.

charter-party was entered into, 'this not being customary under such circumstances.'

As to intent to run the blockade.—In addition to what was above sworn, Harris, a member of the firm of Adderly & Co., in Nassau (the correspondents of Fraser, Trenholm & Co.), declared, on oath, that when the Bermuda was consigned to them from the island of Bermuda, the instructions then given to them were, that, on the arrival of the ship at Nassau, the cargo laden on her should be *landed*, and the ship again laden with a cargo to be delivered at some *port in Europe;* and he swore 'that it was the intention of the firm of Adderly & Co. to carry out *strictly* these instructions, and that there was never any intention that the ship should run the blockade of any of the southern ports of America;
p. 532 but | that the vessel, at the time when she was taken and captured, was, so far as the instructions of the firm went, in the *bona fide* prosecution of a voyage from the island of Bermuda to *these islands*, with a cargo which was to be delivered *here*.'

As respected the power of attorney, or 'certificate,' to sell, Haigh, in a letter, '*per J. R. A.*,' to his agent at Philadelphia, represented, by way of explanation, that 'it was given on the *first* voyage of the Bermuda, as would be seen by the date, and was intended to apply to *that only*.' 'On the vessel's return,' he adds, 'I endeavored to sell her, but could neither do this nor cancel the power until the document was returned from Charleston, whither it had been sent. *This* my agents have hitherto failed to do, owing, seemingly, to the interruption of communications.'

'The registry of such power of attorney,' he concluded, 'is compulsory, and a copy can be obtained from the customs authorities by any one who pays the trifling fee necessary.'

In another paper he gave an account thus:

'In August, 1861, being then the sole registered owner of the steamship Bermuda, I was in hopes that the blockade imposed by the Northern government of the United States against the southern ports might be raised by reason of intervention, arrangement, or otherwise, and I accordingly caused the said steamship to be sent on a voyage to Charleston, in South Carolina.

'I was also desirous that the said steamship should be sold at Charleston, or any other port of the United States, if the opportunity should offer and a sufficient price could be got for her. I accordingly executed a certificate of sale authorizing Mr. Hanckel and Mr. Trenholm, of Charleston, jointly or severally, to carry into effect any desirable sale.

'I am informed and believe that the said steamship, in the prosecution of her voyage, was not warned off by any of the blockading cruisers, and that she entered the port of Savannah without meeting with any of such cruisers, or having the opportunity of ascertaining whether the said blockade was in fact still in force, and there discharged her cargo. |

'In the month of January last the ship returned to England without p. 533
having been sold, but the certificate of sale was not returned to me.

'In the month of February last, 1862, seeing that the blockade had become effective, and that there was little hope of its being raised, I caused the ship to be loaded for Bermuda or Nassau; and, as there was no intention of the said ship entering any of the blockaded ports, I caused application to be made to the registrar of shipping at Liverpool, to grant a new certificate of sale to some parties at Bermuda or Nassau, with a view to her sale at either of those British ports; but the said registrar declined to issue such new certificate unless the old certificate should be first given up to him cancelled.

'The old certificate has never been returned to me, probably by reason of the difficulty of communication between the Southern States and Great Britain; but it was virtually revoked and annulled in the month of February last, all intention of entering any of the Southern ports of the United States being then abandoned.

'EDWIN HAIGH.'

In regard to the munitions of war, Blakely, late a captain in her Majesty's service, but who was now 'a cannon manufacturer and merchant,' swore that in shipping the cannon, shells, fuses, limbers, &c., aboard, which, it appeared, was his part of the cargo (and which he interposed in the District Court to claim), he intended part for the government of Hayti and the rest 'for sale at Bermuda or Nassau, in the usual course of business, to any person willing to purchase the same;' that he had shipped the goods for Bermuda in the first instance, the steamer being bound for that port, but having been informed that Nassau, N. P., offered better opportunities, he desired them to be forwarded thence to Nassau, instructing his friends there, the Messrs. Adderly & Son, to sell those not intended for Hayti, 'to any persons willing to become purchasers, whether Federals, Confederates, or others, according to the prices which they might respectively offer.'

[Captain Blakely, however, did not, nor did the Messrs. | Adderly, p. 534
though they made oaths in the case,[1] produce either originals or copies of these letters.]

It is to be noted, also, that the cargo was by no means confined to munitions of war and such articles already mentioned as were plainly destined for the rebel States. A large part of it consisted of British dry goods and of groceries generally.

As respected the 'government passengers' (the engravers or artists) who undoubtedly wished to run the blockade and get to Charleston, it appeared that they all got out at Bermuda, and that none of them rejoined the vessel when she went to Nassau.

So in regard to Mr. Pringle and the South Carolina gentlemen, registered by disguised names as common sailors, and brought under obligation

[1] See *supra*, p. 1568.

not to quarrel, swear, carry sheath knives, interrupt divine service by indecorous conduct, &c., &c., under penalty of forfeiting more or less pay, the explanation given by Captain Westendorff was, that when they expressed their wish to embark he was on the point of sailing; and that they were put on the crew list in order to get round the British statutes, which required that before a vessel took passengers she should be inspected; an operation which would have required a week's time. All these gentlemen swore that they knew of no purpose on the vessel's part to violate the blockade. The testimony of Mr. Pringle was positive about this.

To the fifth interrogatory, *in preparatorio*, he answered as follows:

'The said vessel sailed from Liverpool on her present voyage and was bound to Bermuda *alone*, and *was not to run any blockade;* so I was *assured* by the agents, the Messrs. Fraser, Trenholm & Co., of Liverpool, who are a branch house, I believe, of John Fraser & Co., of Charleston, S. C.'

All the gentlemen, and several of the artists, in fact, while testifying
p. 535 distinctly their wish and intention to get | into the Southern States, testified that they did not expect to get there on this vessel. Indeed, on arriving at Bermuda, they prepared and offered to the captain

A TESTIMONIAL OF PARTING THANKS.

'On board the Steamship Bermuda,
20th March, 1862.

'Dear Sir: The undersigned, passengers on board your vessel from Liverpool to Bermuda, beg leave, before parting with you, to express their thanks for the kind treatment and unceasing attention which we have received at your hands. Your efforts to add to our comfort and make our time pass pleasantly has served in a great measure to destroy the monotony of a sea voyage. We also take much pleasure in assuring you that the strict attention we have observed you paid to the management of your fine ship has been such as to make us feel always a perfect security and confidence under your care. With our best wishes for your future prosperity,

We are, dear sir, yours, respectfully,

J. J. Pringle,	W. E. Sparkman,
George Dunn,	Wm. G. Embleton,
James McHugh,	P. Gellatly,
George Henry Keeling,	J. McFarland,
J. J. Pringle, Jr.,	Arthur Huger,
J. Poinsett Pringle,	Jno. Gemmell.'

It was not pretended that any of these passengers had concealed their true character from the captain, or in any way changed at any time their ordinary dress; or that they had made concealments of any sort.

The following, in material parts, was the letter of instructions, which, when the vessel set sail from Liverpool, the captain received :

'LIVERPOOL, 28th February, 1862.

'CAPTAIN C. W. WESTENDORFF,

Steamship Bermuda.

'DEAR SIR : You will proceed hence to the port of *Hamilton, Bermuda*, and *there* deliver your cargo, as per bills of lading. | Inclosed is a letter p. 536
of introduction to Mr. N. T. Butterfield, who will assist you in the purchase of coals and in the disbursements of your ship. The bills inclosed (£500) on the Bank of Liverpool, will furnish you the means of paying your disbursements in Bermuda.

'Instructions will follow you as to a return cargo for your ship. If you should have any surplus funds after paying the accounts of the ship, you will bring them in *British gold ;* but should you require more money than the bills herewith will furnish you, we authorize you to value upon us at short sight for what may be wanted, and Mr. Butterfield will assist you in negotiating your bill upon us.

'Our friends in St. John, N. B., are Messrs. W. & R. Wright, and in Nassau, N. P., Messrs. Henry Adderly & Co. ; and *in case of having to take cargo from Bermuda to either of these ports*, you will call upon them.

'We are, dear sir, yours truly,

'FRASER, TRENHOLM & Co.,

'Agents of the owner.'

There was no concealment, apparently, as to anything on board. Everything was fairly entered on the bills of lading and manifest. The crew were shipped, it seemed, for a term not exceeding twelve months, from Liverpool to Bermuda, thence, if required, to any ports or places in the West Indies, British North America, *United States*, and back to the United Kingdom. The wages, if fairly set down, seemed to be at a rate not exceeding that of ordinary voyages in peaceful times, without special risk.

The court below condemned the vessel and the part of her cargo which consisted of munitions of war ; reserving judgment as to the rest. Appeals were now taken here by Mr. Haigh and Captain Blakely. The case was twice elaborately and very well argued, both on reason and authorities, once at the last term and again at this.

Mr. G. M. Wharton and Mr. W. B. Reed, on both arguments, for these appellants : There is really no sufficient evidence of enemy ownership of the vessel. Such ownership is denied positively by numerous respectable persons on oath. The | control which John Fraser & Co., of Charleston, p. 537
had over the voyage of the ship, did not clothe them with any ownership, even in a prize court. That control must be treated as confined to a direction of the ship within the limits of her prescribed voyage, and if that voyage did not include a trip to any blockaded port, or to any port of the enemies of the United States, it cannot affect injuriously the

neutral owners. The power of attorney from Mr. Haigh, was not accompanied with any interest in the attorney. Any sale under it must have been for the use of the principal, and all money received under it would have been the funds of the principal. The power had no reference to the then voyage of the Bermuda. It was an unexecuted one and capable of revocation. If the Bermuda were not, on the voyage in question, destined to a Southern port, the execution of the power would either have been impracticable, or could only have been carried into effect through correspondents in some neutral territory.

Neither is there any sufficient evidence that the vessel meant to run the blockade. Her instructions were to go to Bermuda, to *deliver* her cargo there, and to bring back a return in British gold ; and while there was a provision made for the possibility of carrying the cargo to Nassau, there was none for a destination beyond. The vessel was captured in her direct course to a port confessedly neutral. The artists, who, all admit, wished to get to the Southern States, left the vessel when she got to Bermuda. They left her, because on *her* they could not get to our Southern States. Mr. Pringle, and his friends who embarked at Liverpool, it is as plain, originally expected to go on *this* vessel to Bermuda only ; and though they went on her to Nassau afterwards, it was in the expectation of finding some other conveyance thence to Charleston. The testimony of Mr. Pringle, whose accuracy no one who knew him will question, is positive that the parties knew of no purpose to run the blockade. The unsigned letter attributed to an engineer of the Bermuda —and which will be relied on to support a condemnation—disproves
p. 538 intent to run a blockade. After saying that a detective | was watching them, and that great jealousy existed on account of the cargo, it declares : ' Fortunately they cannot stop us. *We* are on a *lawful* voyage. People won't believe it. They are bound to think we are for running the blockade.' And this foregone conclusion about the Bermuda, which it seems was conveyed here by detectives when she was on the stocks, has been one of the worst impediments to justice in our case. The government had ordered the Bermuda to be captured wherever found.[1] It is assumed, without proof, that the vessel belonged to Fraser, Trenholm & Co. ; and then inferred as an irresistible conclusion that they could not own any vessel and not set her to breaking a blockade.

It being impossible to fix unlawful enterprise on the Bermuda, it will be said that the purpose was to transship the Bermuda's cargo at Bermuda or Nassau ? That is easy to conceive of and to suggest, and even to aver. But conception, suggestion, and even averment are of no weight. Does

[1] See correspondence of Lord Lyons and Mr. Seward, in August, 1862, after the capture, in which these general orders referring to a list were rescinded. (Parliamentary papers, No. 5, 1863.)

the evidence *prove* such a purpose? We say that it does not. It will be argued that the 'Herald' was to perform this office for the Bermuda. The only thing which gives countenance to such an idea is the unsigned and not very trustworthy letter said to have been written by the Bermuda's engineer. The inference is a strained one which gets this purpose of the Herald from that scrawl; one which, moreover, declares on its face that the voyage on which the Bermuda was about to sail, was a 'lawful voyage:' which, would it be if the Herald went as a tender to transship?

The one or two memoranda found on board and said to have been for Captain Westendorff are of the least possible significance. If there be anything in them which shows that they were orders to bring articles through the blockade—which there is not at all as respects the largest —there is assuredly nothing which proves that Captain Westendorff | did p. 539
execute them, or ever meant to execute them, especially to execute them for this voyage or by this ship.

That portions of the cargo—the cutlery, &c.—were intended to invite purchasers at Bermuda for the Southern States may be; but that does not prove enemy ownership in this vessel or her intent to run the blockade. The articles at best were but a fraction, and not a large one, of the cargo; and after having mingled with the stock of the commerce of Bermuda—or Nassau,—sold, *bonâ fide*, to British subjects there—would have found purchasers from the Southern States, of which class of persons the islands had many.

As to the cannon and other munitions of war—sent by Captain Blakely—his affidavit in explanation is clear, reasonable, and sufficient. Federals and Confederates to him were both alike. He was any man's customer in a war.

The fact that Mr. Pringle and his friends, as well as the artists, were entered on the crew list as sailors is abundantly explained by Captain Westendorff. They had not disguised themselves when captured; nor at any time. Indeed there was no concealment as to any part of the cargo. Everything was on the bills and manifests.

The counsel for the claimants then submitted these points of law, which they enlarged upon, enforced, and applied:

1. If the Bermuda were on a voyage, at the time of her capture, from the port of Bermuda, a neutral port, to the port of Nassau, another neutral port, being then a British vessel and owned by a British subject, she was not liable to capture. In order to render her so liable to capture, under these circumstances, she must have been actually on a voyage to Charleston, or some other blockaded port of the Southern States, with an intent to run the blockade.

2. There can be no legal blockade by a belligerent of any other than

a hostile port. There can be none of a neutral port. The Bermuda was, therefore, at perfect liberty to navigate to and fro among the British
p. 540 West India islands, | so far as the question of blockade is concerned, unless she were actually on a voyage to a blockaded port of our country. No blockade of a Southern port could be lawfully extended so as to embrace the waters lying between or about the West India islands.

3. There can be no proper legal assertion of a continued voyage of which Nassau was but an intermediate port, unless the evidence shows (which it does not) that the Bermuda was on her way to a blockaded port, *viâ* Nassau. Every voyage must have a *terminus a quo* and a *terminus ad quem ;* the latter of which, under the evidence, was a port of discharge in the United Kingdom ; and no part of the evidence shows that the Bermuda herself was to proceed as a part of her voyage to any blockaded port. It was no breach of the blockade of any such port to intend to land her cargo, either at Bermuda or Nassau, even though some other vessel was afterwards to endeavor to carry on the cargo to Charleston, provided the Bermuda herself was to return to England.

4. What the voyage of the Bermuda was, is a question of fact to be deduced from all the evidence in the cause. The shipping articles which described it with particularity, are persuasive evidence of the voyage on which the Bermuda started from Liverpool. The letter of instructions to the captain at that place, is in accordance with the shipping articles. The legal construction of those documents is, that the violation of a blockade was not embraced by them ; and that if, after arriving at Bermuda, the ship should be ordered to a port of the United States, some open port, and not a blockaded port, must have been intended. The instruction to the captain which he received at Bermuda to proceed to Nassau, exhausted the power which the verbal charterers of the ship had over her ; and after leaving Nassau under the terms of the voyage, she could only be brought back to the United Kingdom.

5. British merchants, as neutrals in our present war, had a perfect right to trade, even in military stores, between their own ports, and to
p. 541 sell at one of them, even to an enemy of | the United States, goods of all sorts, although with a knowledge that the purchaser bought them with a view of employing them afterwards out of the neutral territory in war against us. A neutral may sell in his own territory, to either belligerent, munitions of war ; the only exception, so far as England and America are concerned, being a prohibition against fitting out vessels of war, or warlike expeditions, in the neutral country, against one of the belligerents.

6. The question of contraband of war cannot arise with respect to any portion of the Bermuda's cargo, unless she were on a voyage to a blockaded port. It is not necessary in law to show that it was part

of the intention of the shippers of the cargo to land and sell it at Nassau. If it was intended to be stored there, and the voyage of the Bermuda to terminate at that place, except as regards her return to England, no question of contraband can arise in the cause.

7. Spoliation of papers is cause of condemnation, and excludes further proof only as against the party committing it, if interested in the vessel or cargo. Against a party not committing the spoliation, and not authorizing it, nor interested in the act, it neither excludes further proof, nor is it damnatory where other circumstances are clear.

8. There is no proof in the cause that any spoliation of papers was authorized by Mr. Haigh, or conduced to his benefit as owner of the ship; nor is there any evidence of the spoliation of any papers which might properly be considered as proprietary documents.

9. The capture of the Bermuda was unjustifiable; because, first, it was made within the range of modern cannon-shot from British territory; second, it was made within a space embraced by a line drawn due south from the nearest headland on the island of Abaco, above the place of capture; third, because it was made, not on the open sea, but in waters constituting channels between islands belonging to Great Britain, a neutral power; and fourth, because it was made before actual search, and under a general authority to seize certain vessels wherever found. |

On each of these points, we conceive that authorities sustain us.[1] p. 542

After argument, on the other side, by *Mr. Speed*, *A. G.*, and by *Mr. Coffey*, special counsel of the captors, who argued the case thoroughly every way—on the facts, on principles of public law, and on English and American precedents—

The CHIEF JUSTICE delivered the opinion of the court.

These appeals were very fully and ably argued at the last term; and, because of the desire of the court to have all the aid that counsel could give in the examination of the important questions of fact and law presented by the record, were ordered to be reargued at this term.

[1] On the first three points the counsel cited The Ada, Daveis, 407; The Moss, Gilpin, 219; The Steen Bille, cited in Dean on Blockade (Introduction), p. xii; The Jonge Pieter, 4 Robinson, 65; The Stert, Id. 53; The Maria, 5 Id. 325; The Thomyris, Edwards, 17.

On the 5th and 6th points: Hautefeuille, Des Droits et des Devoirs des Nations Neutres, tome iii, pp. 222–3; The Imina, 3 Robinson, 167; The Hendrick and Alida, 1 Hay & Marriot, 96; Wheaton's International Law, 568; The Jacob, 1 Robinson, 90; The Tobias, 1 Id. 329; The Franklin, 3 Id. 217; The Neutralitet, 3 Id. 295.

On the 7th and 8th: The Rising Sun, 2 Robinson, 104; The Hunter, 1 Dodson, 480; The Pizarro, 2 Wheaton, 227.

On the 9th: the question of immunity from capture within actual range of modern cannon-shot—one of the points assumed here—was discussed very interestingly, and with great ingenuity and learning; but it all having been on the assumption of a case not regarded by the court as proved, the authorities are not presented.

Under this order they have been again thoroughly and exhaustively discussed, and have since received our most deliberate consideration.

The questions arising upon the ownership of the steamship will first be disposed of.

She was built in 1861, on the eastern coast of England, at Stockton-upon-Tees. On the 1st of August in that year, Edwin Haigh made the declaration of ownership required by the British Merchants' Shipping
p. 543 Act of 1854.[1] In this | declaration he described himself as a natural born British subject, asserted himself to be the sole and exclusive owner, and named E. L. Tessier as master. Upon this declaration a certificate of registry was issued the next day, which repeated the statement that Haigh was owner, and Tessier master; and on the following day, the 3d of August, a joint and several power of attorney to sell the ship, at any place out of the kingdom, at any time within twelve months, and for any price thought sufficient by the attorneys, or either of them, was given by Haigh to A. S. Hanckel and G. A. Trenholm, of Charleston, in South Carolina. With these papers the steamship was despatched to Charleston, on her first voyage; but finding, probably, the entrance of that port too dangerous, ran successfully the blockade of Savannah, and returned to England in January, 1862, after an absence of about five months.

The power of sale was sent to Charleston, and remained there. Haigh asserts that this power was intended only for the first voyage; was given because he wished to have the steamer sold in Charleston, or in some other port of the United States, if opportunity should offer, and a sufficient price could be obtained; and was afterwards virtually revoked when he abandoned the idea of sending her again to any southern port.

It is unfortunate for the credit of these statements, that the power was given to enemies of the United States, resident in Charleston, without access to any loyal port except by running the blockade; that it was not limited by its terms to the first voyage, but, on the contrary, was to continue in force twelve months; that it contained no provision insuring a sufficient price, but left that matter, so important to a real owner contemplating a real sale, to the decision of the attorneys, or either of them; and that there is no evidence in the record of any actual revocation of the power, or of any attempt to revoke it, and none, except Haigh's assertion, that the purpose of again sending the ship to a rebel port was ever abandoned.

p. 544 These first acts bring the ownership into doubt. Haigh | may have been then the true owner; but it is certainly strange that he was in such haste to remove her from his own neutral control, and place her absolutely in the power and at the disposal of the enemies of the United States.

[1] 22 British Statutes at Large, 267, 351, 352.

After her return to England a new voyage was planned for the Bermuda, and Fraser, Trenholm & Co., under whose direction, probably, the first voyage was made, now appear conspicuously in her concerns.

Of the members of this firm, Fraser and Trenholm were, doubtless, citizens of South Carolina ; so also were, probably, Prioleau and Wellsman, who are mentioned as partners.[1] The only partner whose declaration that he was a British subject appears in the record was J. R. Armstrong. The Liverpool house thus composed was a branch of the house of John Fraser & Co., of Charleston, and was employed as a depositary and agent of the rebel government at Richmond.[2]

It was under the direction of this firm that the Bermuda was loaded at Liverpool in February, 1862.

Her former master, Tessier, had been transferred to the Bahama, then at Stockton-on-Tees, but destined to become notorious three months later by her employment, under Tessier, in the conveyance of guns and munitions to the Alabama.[3] In his place, Westendorff had become master of the Bermuda. This person, a citizen of South Carolina, arrived in Liverpool from Charleston in December, in command of the Helen, a ship belonging to John Fraser & Co. Through Fraser, Trenholm & Co., he obtained the official certificate of competency necessary to enable him to take command of the Bermuda, and was appointed master, probably by them, on the 17th January. On the day before this appointment, Fraser, Trenholm & Co. had advised John Fraser & Co. of the despatch of the ship Ella with a cargo to Bermuda Island, to be followed by the steamship Bermuda with goods. The letter containing the advice is not in the record, but the fact appears from a letter of John Fraser & Co. to N. T. Butterfield at Bermuda, relating to these vessels and their cargoes. |

The Bermuda, at the date of the Liverpool letter, was lying at a port p. 545
on the eastern coast, but was at once brought round to Liverpool to receive her cargo.

Her whole lading was under the direction of the Liverpool firm. Haigh was not known in it ; while, on the other hand, Fraser, Trenholm & Co. were regarded as owners by many persons on the ship, and by others who certainly were not ill-informed. Thus Tessier, then in command of the Bahama, writing to Westendorff on the 20th February, spoke of Fraser, Trenholm & Co. as ' our owners.' And so Graham, chief engineer of the Bermuda, deposed on the preparatory examination, ' To the best of my knowledge and belief, Fraser, Trenholm & Co. of Liverpool, England, are the owners of the captured vessel.' The depositions of Heenan, Noble, and Pierson, firemen on board, were to the same effect.

Against this evidence are the declaration of Haigh, the deposition of

[1] Diplomatic Correspondence, 1863, Part I, App., p. lxxii.
[2] Ib., 1863, Part I, p. 90.
[3] Ib. 224, 304, and App., lxxv.

Westendorff, and the affidavit of Armstrong, all affirming ownership in Haigh.

Thus stood matters in relation to ownership when the Bermuda left Liverpool on the 1st of March. She was controlled absolutely, in all respects, by Fraser, Trenholm & Co., and they were quite generally regarded as her owners. They, on the other hand, assert that Haigh was the real owner, and that they were acting as his agents; admitting, however, that they had no charter, and no written authority to represent him.

On the day before sailing, Fraser, Trenholm & Co. addressed a letter to the master, Westendorff, directing him to proceed to the island of Bermuda, and deliver his cargo according to the bills of lading. After some general directions as to money for disbursements and other matters, the letter concludes with the information that 'the friends' of the firm 'in Nassau, New Providence, are H. Adderly & Co.,' and with a direction to 'call on them, in case of having to take cargo from Bermuda to that port.' What other special instructions were given to Westendorff, at Liver-
p. 546 pool, the record does not disclose. Every bill of lading required | the cargo mentioned in it to be delivered at Bermuda, to order or assigns. It is clear that the ship was to go to Bermuda, and not beyond, unless something not specified should occur; and the cargo was to be delivered there and not elsewhere, except in the same contingency, to the order of somebody not named.

The ship arrived at the port of St. George's, in Bermuda, on the 19th or 20th March, and remained there five weeks waiting for orders.

And here we may expect to learn who was the unnamed party to whose order the cargo was to be delivered, and what was the contingency in which it was to be taken from Bermuda to another port.

Haigh asserts, and so does Westendorff, that the unnamed consignee was one Butterfield, a resident of Hamilton, one of the ports of Bermuda, and that Butterfield, as consignee of the cargo, being desirous to have it carried on to Nassau, 'made an arrangement with the master to that effect.' Nothing in the proofs supports, but everything contradicts, this. Butterfield is nowhere named in any paper as consignee; we find no instructions anywhere given to deliver the cargo to him; nor was it by his direction or arrangement that the cargo was sent forward from Bermuda to Nassau.

The real state of facts is disclosed by the letters of Fraser, Trenholm & Co. to John Fraser & Co., and of John Fraser & Co. to N. T. Butterfield, considered in connection with some other matters in the record. On the 23d January, 1862, the branch house at Liverpool wrote to the Charleston house, giving advice of the immediate despatch of the ship Ella to Bermuda with a cargo consigned to John Fraser & Co., or their authorized

agent, with authority to dispose of it in any market they should select. This letter suggested that if the Charleston house should not think best to send an agent to Bermuda, any communication for the master of the Ella should be sent, under cover, to Butterfield, and added, that the master was instructed to await orders at Bermuda. On the 28th of February the Liverpool firm directed another letter to John Fraser & Co., or their authorized | agent at Bermuda, in which they spoke of the 'invoices p. 547
and bills of lading' of the cargo of the Bermuda as 'very full, and as suited to facilitate greatly the delivery and also the transshipment, should this be determined upon.' The letter goes on to say that, 'should the loss of any of the invoices or bills of lading unfortunately happen, duplicates can be furnished hereafter,' but strongly urges, 'in case of an opportunity to send them forward with the letters, the adoption of the most certain measures of preventing any of them falling into improper hands.'

These letters show what unlimited control John Fraser & Co. were expected to exercise over the ship and cargo of the Bermuda; and that control was exercised.

They had been advised of the coming both of the Ella and Bermuda by the letter of the 16th of January, and on the 1st of April they wrote to their correspondent, Butterfield, saying: 'We suppose the steamer Bermuda may be with you ere this, and the ship Ella. We will thank you to request the masters to act as follows, namely: Captain Westendorff to take in the tea and other light articles per Ella, if he has room for them, and proceed to Nassau, reporting himself, on arrival there, to Messrs. Henry Adderly & Co.; Captain Carter to keep in his cargo, and wait further orders from us. They will reach him, we think, very shortly.'

This direction was received at Hamilton, where Butterfield resided, on the 19th of April, and was forwarded the same day to Westendorff, at St. George's, and was implicitly obeyed. Captain Westendorff even refused to allow certain printing presses and materials, which formed part of his cargo, to be landed at Bermuda, though requested to do so by George Dunn, the person who seems to have had them in charge, and though the bills of lading expressly required that they should be delivered at Bermuda. He said that the bills were 'signed to be delivered to order;' that 'the responsibility' of delivery to Dunn would be too great, unless he received instructions to that effect.

No ownership could give more absolute control than was exercised over the ship and whole cargo by John Fraser & | Co. That control and p. 548
the action of the master leave no doubt that they were the unnamed party to whom the cargo was to be delivered, and whose orders the Bermuda was to await; nor can there be any doubt that Westendorff had

instructions to obey, absolutely and in all things, their directions, both as to ship and cargo.

Whether the cargo was to be transshipped, or to be carried on to Charleston without transshipment, was probably left to be determined by circumstances after arrival at Nassau.

It appears from letters and papers in the record that a light draft steamship, named the Herald, was connected with the Bermuda as a tender; and it seems that it was to transshipment into that steamship that Fraser, Trenholm & Co. referred in their letter of January 28.

There is not much about the Herald in the record; but what we find is instructive. A letter, dated Liverpool, February 16, 1862, without signature, but addressed to one of the engineers of the Bahama, and written, probably, by one of the engineers of the Bermuda, says: 'Our tender left yesterday; don't be at all surprised that we have got a tender. They bought a light draft boat at Dublin, used to run the mail once, called the Herald.' The writer proceeds to describe this tender as 'two hundred and eighty feet in length,' drawing 'ten feet heavy, and five and a half feet light;' with 'her boilers stayed and strengthened;' with 'an average speed of eighteen and a half knots;' with 'all her lower cabins razeed to make cargo space;' with 'a crew shipped for twelve months, for some port or ports south of Mason's and Dixon's line;' with 'three captains on board: one an Englishman, nominal; another, an experienced coast pilot from the Potomac to Charleston; and another, the same from Charleston to San Juan.' This correspondent expresses the opinion, that 'if the Yankees catch her, they are smarter than he gives them credit for;' and adds, 'she awaits our arrival at Bermuda,' 'but goes into Charleston first, to see about the stone fleet.' The letter of Tessier to Westendorff, written four days later and already cited, speaks
p. 549 of the Herald as on her voyage across | the Atlantic, under the command of Captain Mitchell. There is a statement, too, in the deposition of Farrally, one of the firemen of the Bermuda, that the Herald was at Bermuda with several captains, while the steamship was there, and was understood to be intended to run the blockade; and that it was 'the talk that the Herald was connected with our ship.' It appears, also, from a bill of exchange drawn by Mitchell, master of the Herald, on Fraser, Trenholm & Co., that Westendorff supplied funds for that steamer at Bermuda.

This bill must have been drawn under instructions, and the fact strongly confirms what other parts of the record disclose of the connection between the two vessels.

The attendance of the Herald was, doubtless, to facilitate transshipment, should transshipment be directed by John Fraser & Co., and to secure the conveyance of the cargo to its ultimate destination.

Why no transshipment took place at Bermuda; whether transshipment was intended at Nassau; whether the Herald visited Charleston during the detention of Westendorff's ship at St. George's; whether it was finally concluded that the Bermuda herself should attempt to run the blockade, are matters thus far left in doubt.

The Bermuda sailed from St. George's on the 23d of April, and was captured on the 27th.

At the time of capture, two small boxes and a package, supposed to contain postage-stamps, were thrown overboard, and a bag, understood to contain letters, was burned. The bag was burned by the captain's brother, and under the orders of the captain, after the vessel had been boarded by the captors. In was burnt, as Westendorff says, in pursuance of his instructions. One of the passengers, also, burned a number of letters, which, he says, were private.

The instructions, in pursuance of which this destruction of papers was made, are not produced; nor is any explanation of this spoliation offered. The instructions were, doubtless, given by John Fraser & Co., in view of the contingency of capture, and were in accordance with the suggestion of | Fraser, Trenholm & Co.'s letter of the 28th of February, p. 550 that the most certain measures should be adopted to prevent any of the bills of lading or invoices falling into improper hands. They, doubtless, included directions for the destruction of all compromising papers, and among them of the instructions themselves. If they had been preserved and produced, it is not unlikely that they would have disclosed the real ownership of the vessel, the true nature of her employment, and the actual destination of both ship and cargo.

This spoliation was one of unusual aggravation, and warrants the most unfavorable inferences as to ownership, employment, and destination.

All these transactions, prior to capture, and at the time of capture, repel the conclusion that Haigh was owner. Not a document taken on the ship shows ownership in him except the shipping articles, and these were false in putting upon the crew list employees of the rebel government and enemy passengers—the last under assumed names. He was permitted to put into the cause his original declaration of ownership of August 1, 1861, by way of further proof; but we cannot give much weight to this, in view of the 'Certificate of Transactions subsequent to Registry,' which shows his execution of the power of sale to Hanckel & Trenholm. After giving that power, there is no indication that he performed a single act of ownership. No letter alluded to him as owner. No direction relative to vessel or cargo recognized him as owner. All the papers and all the circumstances indicate rather that a sale was made in Charleston under the power, by which the beneficial control and real ownership were

transferred to John Fraser & Co., while the apparent title, by the British papers, was suffered to remain in Haigh as a cover.

The spoliation makes the conclusion of ownership out of Haigh and in John Fraser & Co. wellnigh irresistible. Would the master have obeyed such instructions from John Fraser & Co., if he had been really appointed by Haigh, and was really responsible to him as owner? We are obliged to | p. 551 think that the ownership of Haigh was a pretence, and that the vessel was rightly condemned as enemy property.

We will next consider the questions relating both to vessel and cargo, which join arising from employment in the trade and under the direction and control shown by the record, assuming for the moment that Haigh was owner.

How, then, was the Bermuda employed? In what trade, and under what control and direction?

The theory of the counsel for Haigh is that she was a neutral ship, carrying a neutral cargo, in good faith, from one neutral port to another neutral port; and they insist that the description of cargo, if neutral, and in a neutral ship, and on a neutral voyage, cannot be inquired into in the courts of a belligerent.

We agree to this. Neutral trade is entitled to protection in all courts. Neutrals, in their own country, may sell to belligerents whatever belligerents choose to buy. The principal exceptions to this rule are, that neutrals must not sell to one belligerent what they refuse to sell to the other, and must not furnish soldiers or sailors to either; nor prepare, nor suffer to be prepared within their territory, armed ships or military or naval expeditions against either. So, too, except goods contraband of war, or conveyed with intent to violate a blockade, neutrals may transport to belligerents whatever belligerents may agree to take. And so, again, neutrals may convey in neutral ships, from one neutral port to another, any goods, whether contraband of war or not, if intended for actual delivery at the port of destination, and to become part of the common stock of the country or of the port.

It is asserted by counsel that a British merchant, as a neutral, had, during the late civil war, a perfect right to trade, even in military stores, between their own ports, and to sell at one of them goods of all sorts, even to an enemy of the United States, with knowledge of his intent to employ them in rebel war against the American government.

p. 552 If by trade between neutral ports is meant real trade, in | the course of which goods conveyed from one port to another become incorporated into the mass of goods for sale in the port of destination; and if by sale to the enemies of the United States is meant sale to either belligerent, without partiality to either, we accept the proposition of counsel as correct.

But if it is intended to affirm that a neutral ship may take on a contraband cargo ostensibly for a neutral port, but destined in reality for a belligerent port, either by the same ship or by another, without becoming liable, from the commencement to the end of the voyage, to seizure, in order to the confiscation of the cargo, we do not agree to it.

Very eminent writers on international maritime law have denied the right of neutrals to sell to belligerents, even within neutral territory, articles made for use in war, or to transport such articles to belligerent ports without liability to seizure and confiscation of goods and ship. And this is not an illogical inference from the general maxim that neutrals must not mix in the war. International law, however, in its practical administration, leans to the side of commercial freedom, and allows both free sale and free conveyance by neutrals to belligerents, if no blockade be violated, of all sorts of goods except contraband; and the conveyance, even of contraband goods, will not, in general, subject the ship, but only the goods, to forfeiture.

We are to inquire, then, whether the Bermuda is entitled to the protection of this rule, or falls within some exception to it.

It is not denied that a large part of her cargo was contraband in the narrowest sense of that word. One portion was made up of Blakely cannon and other guns in cases, of howitzers, of cannon not in cases, of carriages for guns, of shells, fuses, and other like articles—near eighty tons in all; and of seven cases of pistols, twenty-one cases of swords, seventy barrels of cartridges, three hundred whole barrels, seventy-eight half-barrels, and two hundred and eighty-three quarter-barrels of gunpowder. Another portion consisted of printing-presses and materials, paper, and Confederate States | postage stamps, and is described in p. 553
a letter, found on board, as 'presses and paraphernalia complete,' 'obtained from Scotland by a commissioner of the Confederate government,' and sent with a 'lot of printers and engravers.' The names of these printers and engravers, or at least the names by which they were known on board, are in the crew list; but Westendorff, in a letter already referred to, calls them his 'government passengers;' and all the facts connected with this part of the cargo indicate that it actually belonged to the rebel government and was intended for its immediate use. Other very considerable portions of the cargo were also contraband within the received definitions of the term.

The character of this cargo makes its ulterior, if not direct, destination to a rebel port quite certain. And there is other evidence. The letters of Fraser, Trenholm & Co. make distinct references to the contingency of transshipment; and the evidence shows that the Herald was sent over with a view to this. The consignment of the whole cargo was to order or assigns—that is to say, as we have seen, to the order of John Fraser & Co.

or assigns, and is conclusive, in the absence of proof to the contrary, that its destination was the port in which the consignee resided and transacted business.[1] There is much other evidence leading to the same conclusion; but it is needless to go further.

It makes no difference whether the destination to the rebel port was ulterior or direct; nor could the question of destination be affected by transshipment at Nassau, if transshipment was intended, for that could not break the continuity of transportation of the cargo.

The interposition of a neutral port between neutral departure and belligerent destination has always been a favorite resort of contraband carriers and blockade-runners. But it never avails them when the ultimate destination is ascertained. A transportation from one point to another remains continuous, so long as intent remains unchanged, no matter what stoppages or transshipments intervene. |

p. 554 This was distinctly declared by this court in 1855,[2] in reference to American shipments to Mexican ports during the war of this country with Mexico, as follows: 'Attempts have been made to evade the rule of public law by the interposition of a neutral port between the shipment from the belligerent port and the ultimate destination in the enemy's country; but in all such cases the goods have been condemned as having been taken in a course of commerce rendering them liable to confiscation.'

The same principle is equally applicable to the conveyance of contraband to belligerents; and the vessel which, with the consent of the owner, is so employed in the first stage of a continuous transportation, is equally liable to capture and confiscation with the vessel which is employed in the last, if the employment is such as to make either so liable.

This rule of continuity is well established in respect to cargo.

At first, Sir William Scott held that the landing and warehousing of the goods and the payment of the duties on importation was a sufficient test of the termination of the original voyage; and that a subsequent exportation of them to a belligerent port was lawful.[3] But in a later case, in an elaborate judgment, Sir William Grant [4] reviewed all the cases, and established the rule, which has never been shaken, that even the landing of goods and payment of duties does not interrupt the continuity of the voyage of the cargo, unless there be an honest intention to bring them into the common stock of the country. If there be an intention, either formed at the time of original shipment, or afterwards, to send the goods forward to an unlawful destination, the continuity of the voyage will not be broken, as to the cargo, by any transactions at the intermediate port.

[1] Grove *v.* O'Brien, 8 Howard, 439; Lawrence *v.* Minturn, 17 Id. 106.
[2] Jecker *v.* Montgomery, 18 Howard, 114. [3] The Polly, 2 Robinson, 369.
[4] The William, 5 Id. 395; 1 Kent's Commentaries, 84, note.

There seems to be no reason why this reasonable and settled doctrine should not be applied to each ship where several | are engaged successively p. 555
in one transaction, namely, the conveyance of a contraband cargo to a belligerent. The question of liability must depend on the good or bad faith of the owners of the ships. If a part of the voyage is lawful, and the owners of the ship conveying the cargo in that part are ignorant of the ulterior destination, and do not hire their ship with a view to it, the ship cannot be liable ; but if the ulterior destination is the known inducement to the partial voyage, and the ship is engaged in the latter with a view to the former, then whatever liability may attach to the final voyage, must attach to the earlier, undertaken with the same cargo and in continuity of its conveyance. Successive voyages, connected by a common plan and a common object, form a plural unit. They are links of the same chain, each identical in description with every other, and each essential to the continuous whole. The ships are planks of the same bridge, all of the same kind, and all necessary to the convenient passage of persons and property from one end to the other.

There remains the question whether the Bermuda, on the supposition that she was really a neutral ship, should be condemned for the conveyance of contraband. For, in general, as we have seen, a neutral may convey contraband to a belligerent, subject to no liability except seizure in order to confiscation of the offending goods. The ship is not forfeited, nor are non-offending parts of the cargo.

This has been called an indulgent rule, and so it is.[1] It is a great, but very proper relaxation of the ancient rule, which condemned the vessel carrying contraband as well as the cargo. But it is founded on the presumption that the contraband shipment was made without the consent of the owner given in fraud of belligerent rights, or, at least, without intent on his part to take hostile part against the country of the captors ; and it must be recognized and enforced in all cases where that presumption is not repelled by proof. |

The rule, however, requires good faith on the part of the neutral, and p. 556
does not protect the ship where good faith is wanting.

The Franklin, therefore, carrying contraband with a false destination, was condemned, after mature consideration, by Sir William Scott in 1801.[2] He said that, ' the benefit of the relaxation could only be claimed by fair cases.' This doctrine was shortly after applied to *The Neutralitet* by the same great judge ; [3] and it received the sanction of this court in an opinion delivered by an equal judge, in 1834.[4] The leading principle governing

[1] The Ringende Jacob, 1 Robinson, 90 ; The Sarah Christina, Id. 238. See opinions of Bynkershoek and Heineccius, cited in notes to The Mercurius, Id. 288, and The Franklin, 3 Id. 222.

[2] The Franklin, 3 Robinson, 224.

[3] The Neutralitet, Id. 296.

[4] Carrington *v.* Merchants' Insurance Co., 8 Peters, 518, opinion by Story, J.

this class of cases was stated very clearly by Mr. Justice Story in that opinion, thus: 'The belligerent has a right to require a frank and *bonâ fide* conduct on the part of neutrals in the course of their commerce in times of war, and if the latter will make use of fraud and false papers to elude the just rights of belligerents and cloak their own illegal purposes, there is no injustice in applying to them the penalty of confiscation.'

Mere consent to transportation of contraband will not always or usually be taken to be a violation of good faith. There must be circumstances of aggravation. The nature of the contraband articles and their importance to the belligerent, and the general features of the transaction, must be taken into consideration in determining whether the neutral owner intended or did not intend, by consenting to the transportation, to mix in the war.

The Ranger, though a neutral vessel, was condemned for being employed in carrying a cargo of sea stores to a place of naval equipment under false papers. The owner had not consented, but the master had, and Sir William Scott said, 'If the owner will place his property under the absolute management and control of persons who are capable of lending it in this manner to be made an instrument of fraud in the hands of the enemy, he must sustain the consequences of such misconduct on the part of his agent.'[1] |

p. 557 So, too, *The Jonge Emilia*, a neutral vessel, was condemned on the ground that she appeared to have been altogether in the hands of enemy merchants and employed for seven voyages successively in enemy trade;[2] and *The Carolina*[3] was condemned for employment in the transportation of troops, though the master alleged that it was under duress, and the actual service was at an end.

Now, what were the marks by which the conveyance of contraband on the Bermuda was accompanied? First, we have the character of the contraband articles, fitted for immediate military use in battle, or for the immediate civil service of the rebel government; then the deceptive bills of lading requiring delivery at Bermuda, when there was either no intention to deliver at Bermuda at all, or none not subject to be changed by enemies of the United States; then the appointment of one of these enemies as master, necessarily made with the knowledge and consent of Haigh, if he was owner; then the complete surrender of the vessel to the use and control of such enemies, without even the pretence of want of knowledge, by the alleged owner, of her destined and actual employment.

We need not go further. We are bound to say, considering the known relations of Fraser, Trenholm & Co. with the rebel leaders; and the relations of John Fraser & Co. to the same combination, justly inferable from

[1] The Ranger, 6 Robinson, 126.
[2] The Jonge Emilia, 3 Robinson, 52.
[3] The Carolina, 4 Id. 256.

the fact that they were the consignees of the whole cargo; and considering, also, the ascertained character of most of it, that it seems to us highly probable that the ship, at the time of capture, was actually in the service of the so-called Confederate government, and known to be so by all parties interested in her ownership.

However this may be, we cannot doubt that the Bermuda was justly liable to condemnation for the conveyance of contraband goods destined to a belligerent port, under circumstances of fraud and bad faith, which make the owner, if | Haigh was owner, responsible for unneutral participa- p. 558
tion in the war.

The cargo, having all been consigned to enemies, and most of it contraband, must share the fate of the ship.

Having thus disposed of the questions connected with the ownership, control, and employment of the Bermuda, and the character of her cargo, we need say little on the subject of liability for the violation of the blockade. What has been already adduced of the evidence, satisfies us completely that the original destination of the Bermuda was to a blockaded port; or, if otherwise, to an intermediate port, with intent to send forward the cargo by transshipment into a vessel provided for the completion of the voyage. It may be that the instructions to Westendorff were not settled when the steamship left St. George's for Nassau; but it is quite clear to us that the ship was then at the disposition of John Fraser & Co., and that the voyage, begun at Liverpool with intent to violate the blockade, delayed at St. George's for instructions from that firm, continued toward Nassau with the purpose of completion from that port to a rebel port, either by the Bermuda herself or by transshipment, was one voyage from Liverpool to a blockaded port; and that the liability to condemnation for attempted breach of blockade was, by sailing with such purpose, fastened on the ship as firmly as it would have been by proof of intent that the cargo should be transported by the Bermuda herself to a blockaded port, or as near as possible, without encountering the blockading squadron, and then sent in by a steamer, like the Herald, of lighter draft or greater speed.

We have not thought it necessary to examine the questions made by counsel touching the right of belligerents to make captures within cannon-shot range of neutral territory, for there is nothing in the evidence which proves to our satisfaction that the Bermuda was within such range.

Our conclusion is, that both vessel and cargo, even if both were neutral, were rightly condemned; and, on every ground, the decree below must be

AFFIRMED. |

[After the preceding confirmation of the decree of the District Court of Phila- p. 559
delphia—which, it will have been noted by the reader, was one condemning only

the vessel (claimed by Haigh), and the munitions of war, &c. (claimed by Captain Blakely)—judgment as to the residue of the cargo having been reserved,—a decree was passed by the District Court, condemning this whole residue also.—See 23 Legal Intelligencer, 116.]

NOTE.

Along with the preceding case was submitted another, much like it, the case of—

The Hart.

(3 Wallace, 559) 1865.

Neutrals who place their vessels under belligerent control, and engage them in belligerent trade; or permit them to be sent with contraband cargoes, under cover of false destination, to neutral ports, while the real destination is to belligerent ports; impress upon them the character of the belligerent in whose service they are employed, and the vessels may be seized and condemned as enemy property.

THE present case came here by appeal from a decree of the District Court of the United States for the Southern District of New York; a decree condemning the schooner Hart and her cargo as lawful prize of war. The vessel was claimed below by one Harris; the cargo by Samuel Isaacs.

The whole cargo consisted of arms and munitions of war, taken on board, principally, at London, under the direction of agents of the rebel government, with consent, by the owner or owners of the schooner, to the intended fraud on belligerent rights. The nominal destination of the vessel and cargo was Cardenas; but the preparatory proofs clearly established that this pretended destination was false, and that the entire lading was to be there transshipped, to be conveyed by a swifter vessel, or was to be carried on without transshipment to its belligerent destination, at the discretion of the rebel agent, whose instructions the master was directed to receive and obey on arrival at Cardenas.

Mr. Coffey, for the captors; no one appearing, nor any argument being submitted for the claimants.

p. 560 The CHIEF JUSTICE: The case in its principal features resembles that of the Bermuda and her cargo; they are, perhaps, even more irreconcilable with neutral good faith.

It is enough to say that neutrals who place their vessels under belligerent control, and engage them in belligerent trade, or permit them to be sent with contraband cargoes under cover of false destination to neutral ports, while the real destination is to belligerent ports, impress upon them the character of the belligerent in whose service they are employed, and cannot complain if they are seized and condemned as enemy property.

The principles recognized in the preceding case require the affirmance of the decree of the District Court; and it is

AFFIRMED ACCORDINGLY.

The Admiral.

(3 Wallace, 603) 1865.

1. A case in prize, carried by appeal from a District Court into a Circuit Court, before the statute of March 3, 1863, allowing appeals in prize directly from the District Courts to this court, is properly here on appeal from the Circuit Court.
2. A vessel setting sail from England on the 9th September, 1861, with actual knowledge of a proclamation which the President of the United | States made p. 604
on the 19th of the April preceding,—that is to say, made nearly five months previously,—declaring that certain of our Southern States were in insurrection, and that a blockade would be established of their ports,—had no right, under an allegation of a purpose to see if the blockade existed, to sail up to one of those ports actually blockaded.
3. The declaration in the President's proclamation of the date just mentioned, that if a vessel, with a view to violate the blockade, should approach or attempt to leave either of the said ports, she would be 'duly *warned* by the commander of the blockading vessels, who would indorse on her registry the fact and date of such warning;' and that if the same vessel 'shall *again* attempt to enter or leave the blockaded port she will be captured,' does not apply to such a case; but the vessel is liable without any previous warning.
4. Mere sailing for a blockaded port is not an offence; but where the vessel has a knowledge of the blockade, and sails for the blockaded port with the intention of violating it, she is clearly liable to capture.
5. Where, during our civil war, the clearance of a vessel expressed a neutral port to be her sole port of destination, but the facts showed that her primary purpose was to get cargoes into and out of a port under blockade,—the outward cargo, if got, to go to the neutral port named as the one cleared for,—the fact that the vessel's letter of instructions directed the master to call off the blockaded port, and, if he should find the blockade still in force, to get the officer in command of the blockading ship to indorse on the ship's register that she had been warned off (in accordance with what it was asserted by the owners of the vessel was their understanding of neutral rights under the President's proclamation above mentioned), and *then* to go to the port for which this clearance called—will not save the vessel from condemnation as prize in a case where she has been captured close by the blockaded port, standing in for it and without ever having made an inquiry anywhere whether the port was blockaded or not. Presumption of innocent purpose is negatived in such a case.

On the 19th April, 1861—seven days after Fort Sumter was fired on, and near the beginning, therefore, of our late civil war—the President of the United States issued a proclamation, by which he declared that an insurrection existed in certain of the Southern States, and that he deemed it advisable 'to set on foot a blockade of the ports within the said States.' 'For this purpose,' the proclamation proceeded, 'a competent force *will* be posted so as to prevent entrance and exit of vessels from the ports aforesaid.' 'If, therefore,' the document continued, 'with a view to violate such blockade, a vessel shall approach, or shall attempt to | leave either of the said ports, *she will be duly warned by the* p. 605
commander of one of the blockading vessels, who will indorse on her registry the fact and date of such warning; and if the same vessel shall *again*

attempt to enter or leave the blockaded port, she will be captured and sent to the nearest convenient port, for such proceedings against her and her cargo as may be deemed advisable.'

Among the ports included with the proclamation was the port of Savannah, Georgia.

On the 9th September, 1861—that is to say, *five months after the proclamation was published*, and the English having knowledge of it—the British ship Admiral was chartered at Liverpool by the firm of W. & R. Wright, of the British province of New Brunswick, to proceed with a cargo of salt 'off the port of Savannah, and, if the blockade is raised, then to proceed into port, and deliver the salt according to her bill of lading; and if the blockade be *not* raised, then the ship to proceed to St. Johns, New Brunswick, and there deliver the same, with the usual despatch of the port.' The stipulated freight was thirty shillings per ton, if the cargo should be landed at *Savannah*, and fifteen shillings per ton, if landed at *St. John's*.

The owners' *letter of instructions* to the master, inclosing the charter-party, and referring to our civil war, ran thus:

'The inclosed charter with the Messrs. Wright will show you nature of the voyage. These gentlemen, like many others, hold the opinion that this unfortunate contest cannot last long, it being so obviously the interest of both parties to bring it to a close. This being so, and their being very wishful to have a cargo of pitch-pine from Savannah to St. John, so soon as the port is again opened, is our great reason for their making it a condition in taking the ship, that she should go off Savannah, so that, if possible, they might have the very first shipment of timber. Of course, in calling off, you will endeavor to meet the blockading ship (if the blockade is found to exist still), and then get the officer in command to indorse on your register that the ship has been warned off. This will be all that is necessary for us, as owners of the ship, to justify your
p. 606 departure for St. | John's, and there consigning the ship to the Messrs. Wright, to whom, in the meantime, we will write respecting you.

'*You will distinctly understand, therefore, that you run no risk whatever with the ship, but rather endeavor to satisfy yourself as to the blockade, and then find out the man-of-war, report yourself, and get the register indorsed.* You will, no doubt, speak some vessels when approaching the American coast, so as to ascertain exactly the state of matters, *and be guided thereby in such way as not to infringe the blockade regulation.*'

Under this charter-party and this letter of instructions, the Admiral sailed from Liverpool, upon a direct course for Savannah, on the 12th of September, 1861. *Her certificate of clearance on board expressed St. John's, New Brunswick, as the sole port of her destination.*

On the 11th December, 1861, when about thirty miles off Tybee Island—an island that lies near the entrance to Savannah—the vessel was boarded by a ship of the blockading squadron. At this time she was standing directly for the port of Savannah, the same being then

under efficient blockade, and the boarded vessel having made no inquiry anywhere, after leaving Liverpool, as to whether the blockade existed. At this time *Port Royal*, one of the ports of the Southern coast, and some distance above Savannah, was in our possession, having been taken by our squadron on the 7th of November preceding. This fact, however, was not known to those aboard the Admiral. When hailed, she made no resistance. On being boarded she produced her clearance for St. John's (which was more than a thousand miles from the place she then was), along with her letter of instructions; and professed that, in coming to the region in which she was, her purpose was to ascertain whether the blockade was raised, as she supposed when leaving England that it would be; numerous predictions to that effect having been made before she left England, as also confident assertions that the Federal Government would find it impossible to blockade effectively the Southern coast, three thousand miles in length. She declared her readiness, on having a notice and warning indorsed on her registry—as the proclamation | of the President contemplated that, in such a case as hers, notice and warning should be indorsed—to proceed to St. John's, in accordance with what her letter of instructions contemplated she should do, if she found the blockade existing, and had 'notice' and 'warning' indorsed accordingly. p. 607

This was not satisfactory to the blockading officers, and the vessel was brought in to Philadelphia, and proceeded on, with her cargo, in the District Court there, for prize. The vessel was claimed by a certain Fernie & Co., of Liverpool, England, and the cargo by W. & R. Wright, already mentioned as of St. John's, all the claimants being British subjects.

The District Court restored the cargo but condemned the vessel. From this condemnation Fernie & Co., her claimants, appealed to the Circuit Court;—Congress not having as yet required, as it did by the statute of 3d March, 1863, afterwards passed, that appeals in prize causes to this court should be made directly from the District Court.

In the court below it was argued in behalf of the claimants of the cargo, that the papers fully set out the voyage and intent of the parties; that the captain's conduct, when captured, was frank; no resistance, no attempt to falsify, and no suppression. That to ascertain what the intent was the case was to be tried and the conduct of the parties judged by the state of things in September, 1861; that the proclamation of the President did not say that the ports *were* blockaded, but that they *would* be; that this was all in the *beginning* of the rebellion; that it was then again and again declared that, within a short time, at farthest, the blockade would cease. Port Royal, as the event proved, had come to be in our possession at the time. It might as well, nearly, have been Savannah; but, as it was, events showed that—giving 'days of grace'

proportioned to the matter—allowing the margin proper—not holding parties too much *au pied de la lettre*—there was perhaps no such misconception, after all, by those who predicted, as eminent persons in our country notoriously did, that the rebellion would be an affair of sixty days, and that the Southern ports would soon be open. Neither was
p. 608 the English idea that the blockade would | be ended, wrong as to result —though it was greatly so as to the cause by which the end would come. However, that was unimportant; the question being only as to the purity of intent, and the matter resting, therefore, on the *fact* of actual belief; a belief which certainly existed in England when the Admiral sailed; and at New Brunswick. Undoubtedly—it was said—in these questions *intent* is the matter to be inquired of. In *Medeiros* v. *Hill*, in the English Common Bench,[1] and where Sir Nicholas Tindal gave the judgment, the whole reasoning goes on the idea that where no actual entry or exit is shown, the intent is the matter to be inquired into; and, that while in the absence of express proof, any bad intent may be presumed, yet that where the true intent *is* shown none other than it can be inferred. And the stringency of a contrary rule was relaxed by Lord Stowell himself in some cases; as *The Betsey*.[2] Speaking of Americans during a blockade of European ports, he there said: 'I cannot think it unfair to say, that lying at such a distance, where they cannot have constant information of the state of the blockade, whether it continues or is relaxed, it is not unnatural that *they* should send their ships *conjecturally*.' He expressed like views in *The Adelaide*.[3] It was said finally that here the enterprise, whatever it was, was for the benefit of the cargo; that, in fact, the whole undertaking was a charter of the ship to dispose of this cargo and get another for the same owner, and that no case could be cited in which where *the cargo—the whole object and intent of the voyage—was found to be honest, the ship* (the mere carrier) *was held*. In this case both ship and crew were but the merest servants of the cargo; all of it belonging to one adventure and having but only one ultimate object.

The Circuit Court affirmed the decree of the district judge; the following being the opinion given by the presiding justice on the former bench:

Grier, J.: Iagree with Chief Justice Tindal, in *Medeiros* v. *Hill*,
p. 609 'that the mere act of sailing to a port which is blockaded | at the time the voyage is commenced is not an offence against the law of nations, where there is no premeditated intention of breaking the blockade.' Consequently, if, in the present case, the Admiral had taken out a clearance for Savannah, with the expectation that the blockade might be removed before her arrival, with instructions to make inquiry as to its continuance

[1] 8 Bingham, 231. [2] 1 Robinson, 334.
[3] 3 Id. 283; see also The Little William, 1 Acton, 141, per Sir W. Grant.

at *New York*, or *Halifax*, or other neutral port, and after having made such inquiry, had made no further endeavor to approach or enter the blockaded port, her seizure and condemnation as prize could not have been justified; but she presents a very different case. She was off Tybee Island, sailing for the blockaded port. She had made no inquiry on the way; had no reason to believe the blockade to be raised; and when arrested in her attempt to enter, she exhibits a clearance for St. John's, New Brunswick, a port she may be said to have passed, and a letter of instructions from the owners 'to call off the harbor of Savannah, to endeavor to meet the blockading ship, and get the officer in command to indorse the register,' &c., but to make no attempt to run the blockade.

The clearance is the proper document to exhibit and disclose the intention of a ship. The clearance, in this case, may not properly come within the category of 'simulated papers;' but it does not disclose the whole truth. The suppression of a most important part makes the whole false. It may be true, that in times of general peace, a clearance, exhibiting the ultimate destination of a vessel, without disclosing an alternative one, may have sometimes been used by merchants to subserve some private purpose. But in times of war, when such omissions may be used to blindfold belligerents as to the true nature of a ship's intended voyage, and to elude a blockade, the concealment of the truth must be considered as *primâ facie* evidence of a fraudulent intention. The Admiral, with a full knowledge that her destined port is blockaded, takes a clearance for St. John's, and is found a thousand miles from the proper course to such port, in the act of entering a blockaded port; and when thus arrested, for the first time, inquires whether the blockade has been raised.

A vessel which has full knowledge of the existence of a blockade, before she enters on her voyage, has no right to claim a warning or indorsement when taken in the act of attempting to enter. It would be an absurd construction of the President's proclamation to require a notice to be given to those who already | had knowledge. A notification p. 610
is for those only who have sailed without a knowledge of the blockade, and get their first information of it from the blockading vessels. Now, the primary destination of this vessel was to a blockaded port. If the owners had reason to expect that possibly the blockade might be raised before the arrival of their vessel, and thus a profit be made by their ability to take the first advantage of it, their clearance, in the exercise of good faith, should have made admission of the true primary destination of the vessel. If the truth had appeared on the face of this document, and if the master had been instructed to inquire at some intermediate port and to proceed no further in case he found the blockade still to exist, the owners might justly claim that their conduct showed no premeditated intention of breaking the blockade. But when arrested in the attempt to enter a port known to be blockaded, with a false clearance, it is too late to produce the bill of lading or letter of instructions to prove innocency of intention. In such cases intention can be judged only by acts. The true construction of this proceeding may be thus translated: 'Enter the blockaded port, if you can, without danger; if you are arrested by a blockading vessel, inform the captor that you were not instructed to run the blockade, but had merely called for information, and would be pleased to have your register indorsed, with

leave to proceed elsewhere.' If so transparent a contrivance could be received as evidence of a want of a premeditated intention to break the blockade, the important right of blockade would be but a *brutum fulmen* in the hands of a belligerent. 'It would,' says Lord Stowell, in some case, 'amount, in practice, to a universal license to attempt to enter, and being prevented, to claim the liberty of going elsewhere.' In the cases where the stringency of the general rule, established by this judge (but overruled in *Medeiros* v. *Hill*) had been by him relaxed as to American vessels in certain circumstances, the clearances were taken contingently, but directly for the blockaded port, in the expectation of a relaxation of the blockade, with instructions to inquire as to the fact at a British or neutral port. The clearance exhibits the whole truth, and the place of inquiry, their good faith. In these most material facts, this case differs from them.

I concur in the decree of the District Court.

AFFIRMED. |

p. 611 On appeal from this decree of the Circuit Court the matter—including apparently some query as to the right of appeal from the Circuit Court under the act of March 3, 1863,—came for review here. It was argued fully by *Mr. Donahue for the appellants*, and by *Mr. Assistant Attorney-General Ashton* (who had argued it also in the courts below), *for the United States*.

Mr. Justice CLIFFORD delivered the opinion of the court.

Capture of the ship, together with the cargo, was made on the eleventh day of December, 1861, as lawful prize of war, and both were regularly prosecuted as such in the District Court. Claim for the ship was presented by the master on behalf of Fernie Brothers & Co., of Liverpool, in which he alleged that they were British subjects, and the true, lawful, and sole owners and proprietors of the vessel, her tackle, apparel, and furniture. Record also shows that the master filed at the same time a claim for the cargo on behalf of W. & R. Wright, of St. John's, in the province of New Brunswick, in which he alleged that they were the true, lawful, and sole owners and proprietors of the same, and that they also were British subjects. Accompanying the claims for the ship and cargo is the test affidavit of the master, which was filed at the same time, and which contains substantially the same allegations. Preparatory proofs were duly taken, and the parties were fully heard.

District Court entered a decree condemning the vessel as lawful prize, but acquitted the cargo, and ordered that the same be restored to the owners. Claimants of the vessel appealed to the Circuit Court of the United States for that district where the decree of the District Court condemning the vessel was affirmed, and thereupon the claimants appealed to this court.

1. Appeal to the Circuit Court was allowed before the passage of the act of the third of March, 1863, which requires that appeals from the

District Courts in prize causes | shall be made directly to the Supreme p. 612
Court.[1] Prior to the passage of that act the Supreme Court had no appellate jurisdiction in prize causes, except when the same were removed here from the Circuit Courts. Exclusive original cognizance of all civil causes of admiralty and maritime jurisdiction was by the ninth section of the Judiciary Act conferred upon the District Courts, and it was conclusively determined, at a very early period in our history, that prize jurisdiction was involved in the general delegation of admiralty and maritime powers as expressed in the language of that section.[2] First decision to that effect was that of *Jennings* v. *Carson*,[3] but the question was shortly afterwards authoritatively settled by the Supreme Court in the same way.[4]

Admiralty and maritime causes, where the matter in dispute, exclusive of costs, exceeded the sum or value of three hundred dollars, might under the Judiciary Act be removed by appeal from the District Courts to the Circuit Courts, but such causes could only be transferred from the Circuit Courts to the Supreme Court by writ of error.[5]

Provision, however, for appeals from the Circuit Courts to the Supreme Court was afterwards made in cases of equity, of admiralty and maritime jurisdiction, and of prize or no prize, where the matter in dispute, exclusive of costs, exceeds the sum or value of two thousand dollars.

Same act also reduced the minimum sum or value required for appeals from the District Courts to the Circuit Courts to the sum or value of fifty dollars exclusive of costs, and made it the duty of the Circuit Courts to hear and determine all such appeals.[6] Present case was appealed from the District Court to the Circuit while the last-mentioned provision was as applicable to prize causes as it still is to all the other matters of jurisdiction therein specified, and consequently | the case under considera- p. 613
tion is properly before the court.

2. Coming to the merits of the controversy, it is proper to refer to the evidence exhibited in the record, and to deduce from it as far as possible the real character of the adventure, which is the subject of investigation. Owners of the ship were Fernie Brothers & Co., of Liverpool, and the charterers were W. & R. Wright, of St. John's, New Brunswick. Charter-party was dated at Liverpool on the ninth day of September, 1861, and the principal stipulation as to the voyage was that the ship should proceed off the port of Savannah, and if the blockade was raised, then to proceed into port and deliver the cargo as per bill of lading; but if the blockade was not raised, then the ship was to proceed to St. John's, New Brunswick, and there to deliver the same with

[1] 12 Stat. at Large, 760. [2] 1 Id. 77. [3] 1 Peters's Admiralty, 7.
[4] Glass *v.* The Sloop Betsey, 3 Dallas, 16; 1 Kent's Commentaries, 389; 2 Stat. at Large, 761.
[5] 1 Stat. at Large, 83, 84. [6] 2 Id. 244.

the usual despatch of the port. Stipulated freight was thirty shillings per ton if the cargo should be landed at Savannah, and fifteen shillings per ton if landed at St. John's, for which latter port the vessel was cleared, as represented in the clearance certificate. Charterers furnished the cargo, but the owners were to have an absolute lien on the same for all freight, dead freight, primage, and demurrage. Vessel sailed for the port of Savannah, and there is not a fact or circumstance in the case tending to show that her primary destination was such, or was ever intended to be such, as is described in the clearance. On the contrary, the owners, in their letter of instructions to the master, admit that the charterers, being anxious to procure a particular cargo from Savannah, made it a condition in taking the ship that she should proceed off that port, so that if the port was open they might secure the very first shipment. When the ship sailed the mate supposed that she was bound for St. John's, but he soon found, as he states, that she was going too far to the southward for such a voyage, and he at once began to suspect that the master intended to go into a southern port. Master's instructions evidently contemplated that the ship might speak other vessels as she approached the coast of the United States, and that the master would
p. 614 be enabled through those | means to ascertain the exact state of affairs, but the master was not directed in any event to abandon the voyage and return.

Substance of the directions in that event was that he was to be guided by any information he might thus obtain, so as not to infringe the blockade regulations, but the clear inference from the document is that the ship was nevertheless to proceed off the blockaded port, and then if met by a blockading vessel to get the officer in command to indorse on the register that the ship had been warned off. Specific directions to the master are that he is to run no risk with the ship, but he is to proceed on the voyage and rather endeavor to satisfy himself as to the blockade, and then find the blockading vessel and get his register indorsed. Cautious as these instructions are, still there is enough in them to show the criminal motives of their authors, especially when it is considered that the ship, under the eye of the owners, sailed from the port of departure under a clearance expressing a false destination. Shippers doubtless expected considerable profits from the sale of the outward cargo, but their controlling motives in chartering the ship were the anticipated profits of the return voyage from the blockaded port. Shipowners were also deeply interested in the success of the adventure, as they were to receive double the amount for freight if the outward cargo was landed at the port of primary destination. Full proof of these facts is exhibited in the record, and it is shown beyond the possibility of doubt that the master, the charterers, and the owners had full knowledge of the existence

of the blockade at the inception of the voyage, and there can be no doubt that it was the knowledge of that fact which induced the parties to commence the voyage under a clearance which misrepresented the primary destination of the vessel.

3. Settled rule as established by a majority of this court is that a vessel which has a full knowledge of the existence of a blockade is liable to capture if she attempts to enter the blockaded port in violation of the blockade regulations, and that it is no defence against an arrest made under such circumstances | that the vessel arrested had not been p. 615
previously warned of the blockade, nor that such previous warning had not been indorsed on her register.[1]

4. Unlike what is usual in cases of this description it is conceded in this case that the primary destination of the vessel was to the blockaded port; but it is insisted that the mere act of sailing to a port which is blockaded at the time the voyage is commenced is not an offence against the law of nations where there is no premeditated intention of breaking the blockade. Take the proposition as stated, and it is undoubtedly correct, but it is equally well established that it is illegal for a ship having knowledge of the existence of a blockade to attempt to enter a blockaded port in violation of the blockade, and this court decided at the last term that after notification of a blockade the act of sailing for a blockaded port with the intention of violating the blockade is in itself illegal.[2]

5. But it is unnecessary even to consider any extreme rule in this case, as every pretence of innocence is negatived by the circumstances. Fraud is stamped upon the adventure from the commencement of the voyage to the moment of capture. Such a misrepresentation as that expressed in the clearance might be used to advantage by the master, if his vessel was met by a cruiser in mid ocean as a means to allay suspicion, and it was doubtless intended for some such purpose. While sailing for the blockaded port such a document might be very effectual to enable the master before he had passed the port of pretended destination to deceive belligerents and elude the vigilance of their cruisers. Successful use of that means of deception, however, could not be made at the time of the capture, because the vessel was then off Tybee Island, more than a thousand miles from the proper course to the port specified in the clearance. Seeing that such a pretence would not be likely to avail, the master did | not present the certificate of clearance, but resorted p. 616
to the terms of the charter-party and the letter of instructions, and insisted that those showed that the vessel did not intend to violate the

[1] The Barque Hiawatha, 2 Black, 677.
[2] The Circassian, 2 Wallace, 135; Medeiros *v.* Hill, 8 Bingham, 234; The Neptune, 2 Robinson, 110; The Panaghia Rhomba, 12 Moore, Privy Council, 168.

blockade regulations. Arrested, as the ship was, when near the blockaded port, and when heading for the land, and when in point of fact she was in the act of entering the port, the master then, instead of presenting the clearance for the port which he had passed, set up the pretence that his purpose was to inquire whether the blockade had been raised, and claimed that he must be first notified of a fact, which he knew when the ship sailed, before the capture could lawfully be made. Such a defence is without merit, and finds no support in any decided case, or in any acknowledged principle applicable to prize adjudications.

Inculpatory force of the evidence is much increased by the fact that the inception of the voyage is marked by a full knowledge of the existence of the blockade ; and that the vessel, instead of touching at the port for which she was properly cleared, where inquiry might have been made, proceeded directly for the prohibited destination. Conduct of the master also, in withholding from the mate all knowledge of the real destination of the vessel, shows that the clearance certificate was evidently obtained in the form referred to as the means, if it became necessary to use it for that purpose, of deceiving belligerents and of eluding the vigilance of national cruisers. None of these circumstances can be successfully controverted ; and the claimants admit that the course of the vessel was directly for the blockaded port, and that she was heading for the land at the moment of capture. Every pretence that the vessel intended to desist from her unlawful purpose, if she found that the port was blockaded, is negatived by the circumstances. Those in charge of her knew before she sailed that the port was blockaded, and they also knew that they had no reason to suppose that it was to be raised before her arrival, consequently they made no inquiry and did not wish to make any until it became necessary to do so as a defence or excuse for an illegal act.

DECREE AFFIRMED.

The Herald.

(3 Wallace, 768) 1865.

Knowledge of a recently established blockade inferred against a neutral from facts stated in the case.

APPEAL from a decree of the Circuit Court at Philadelphia condemning the Herald and cargo as prize of war, for breach of blockade in an attempted exit from Beaufort, North Carolina ; in part as enemy's property, &c. The case was thus :

On the 27th April, 1861, President Lincoln, reciting the insurrectionary action which had been for some time going on in the South,[1] and the blockade which he had, on the 19th previous, announced of

[1] The firing on Sumter was on the 12th of April, 1861.

ports of South Carolina, &c. ; reciting also insurrection in *North Carolina* and Virginia, proclaimed that

'An efficient blockade of the ports of those States WILL also be established.'

And on the 30th of the same month Commodore Pendergrast, commanding the Home Squadron, issued the following manifesto from his flag-ship :

UNITED STATES FLAG-SHIP CUMBERLAND,
OFF FORTRESS MONROE, VA., April 30, 1861.

To all whom it may concern :

I hereby call attention to the proclamation of his Excellency, Abraham Lincoln, President of the United States, under date of April 27, 1861, for an efficient 'blockade' of the ports of Virginia and North Carolina, and warn all persons interested that I have a sufficient naval force HERE for the purpose of carrying out that proclamation.

All vessels passing the capes of Virginia, coming from a distance, and ignorant of the proclamation, will be warned off ; and those passing Fortress Monroe will be required to anchor under the guns of the fort, and subject themselves to an examination.

G. J. PENDERGRAST,
Commanding the Home Squadron. |

In this state of public announcements, emanating as mentioned, p. 769
the 'Herald,' a British built, and originally a wholly British owned vessel, arrived at Boston on the 20th May, 1861. She carried a British register and a British flag. A portion of her was owned, however, by De Wolf, a merchant of New York. This interest, acquired in 1854, was never registered, nor was it evidenced by any proprietary document.

On May 24, 1861, while lying in Boston harbor, the vessel was, as alleged, chartered, through the master, to a Mr. Williams, a citizen of the United States and a resident merchant of New York, for a voyage from Boston to *Beaufort*, and *thence to Liverpool*. Three copies of the charter appear to have been executed by the master.

Having effected this charter with Williams at New York, the master returned to Boston, and cleared his vessel at the custom-house there for Turk's Island. 'The reasons why I cleared for Turk's Island,' said the master after capture, 'were, that I did not wish my crew to know that I intended to go to a Southern port ; and I also designed, *in case I found Beaufort blockaded*, to go next to Turk's Island for a cargo.'

With this clearance on board, the 'Herald,' on the 25th of May, set sail from Boston, without cargo, and arrived at Beaufort very early on the morning of the 9th of June. The master did not go in on arriving. He gave this account :

'The *wind being then off shore*, I hauled the brig up by the wind and fetched in close to the land, about twenty miles to the southward of

Beaufort harbor, and then I tacked and stood off and on all that, the ninth day of June, till about seven or eight o'clock P.M., when and because the wind was ahead, *and the lights at the entrance of the harbor being out*, I anchored about seven miles to the southward of the entrance to Beaufort harbor, where I remained till about half-past *one o'clock on the next morning*, when, the wind being more favorable, I got under way and stood up towards Beaufort harbor; and on my way up, *the morning being dark*, I ran aground. I got off again, and proceeded up towards the
p. 770 harbor till daylight. Soon after I hove | to, and set the English ensign at the fore as the signal for a pilot, who, in about half an hour, came alongside, and of whom I then asked if the port was or had been blockaded; and he answered me *that it had not been and was not*, and that no vessel of war had been seen off that port.'

He immediately reported his arrival to a Mr. Charles Parmlee, of Goldsboro, North Carolina, and delivered to him a sealed letter which he had received in New York from Mr. Williams, the charterer. Its contents could only be inferred by the court. Under the direction of Mr. Parmlee and his brother a cargo consisting wholly of the staples of North Carolina —turpentine, tar, rosin, tobacco, &c.—was shipped; a portion of it consigned by Parmlee, as '*agent*,' to the consignees of the vessel at Liverpool, and the rest by various shippers of Newbern, Wilmington, Beaufort, and Petersburg, places in North Carolina then in war against the United States, to Fraser, Trenholm & Co., and W. A. and G. Maxwell & Co., of Liverpool; firms, the former by distinction, in close and active complicity with the rebel enemies of the United States.[1]

The vessel remained at Beaufort about a month, taking in a cargo there, and at Morehead City, and meeting some opposition, as the captain testified, from the civil and military persons then in control, and who, he stated, supposed that the cargo might belong to merchants in the North, and contemplated a seizure of it. He sailed for Liverpool July 14th, got fairly out to sea—a hundred and forty-five miles from Beaufort—testifying that it was not till then that 'he saw or heard of any blockade or blockading vessel.' He then heard of it; being captured. *He had no copy of the charter aboard.* On his examination *in preparatorio*, while saying that he 'had seen no blockade yet,' he added:

'About three weeks before I came out of Beaufort I saw what I supposed to be a man-of-war, from the tops of the buildings. I saw two spars, but no hull, with a glass, and saw she was standing to the
p. 771 northward, almost a week before sailing. The | British ship Gladiator came near the bar. These are all the men-of-war I saw before the capture.'

A ship-hand, Homer, said that he knew no cause why the vessel had been captured, other than that she came out of a Southern port.

[1] See The Bermuda, *supra*.

Interrogated as to what vessels he had seen, and what notice was given, he added :

'During the time we were lying at Beaufort, I saw three different men-of-war off the harbor ; and during the last two weeks we were there I saw a man-of-war as often as once in three days. No notice or warning, as far as I know, was given to the captured vessel.'

The mate of the vessel testified—

'I suppose we were captured because we sailed from a Southern port ; but we saw no blockading force off Beaufort. *It was reported three times* from Fort Macon that a man-of-war was off the harbor, but I *only saw one* while we were lying there.'

A letter, from which what follows are extracts, found on the Herald, gave some information on the same matter :

BEAUFORT, July 11, 1861.

MESSRS. FRASER, TRENHOLM & Co., Liverpool :

GENTLEMEN : We take the liberty of addressing you these lines, as our country has become divided into North and South, and we, *as full-blooded Southerners*, shall carry this matter out.

Formerly our business has been done principally by New York merchants. We have dealt with them and owned vessels together, and have no fault to find with them directly, *only* they are North and we are South. Circumstances have changed, and we, as well as a great many of our Southern friends, intend to change our business.

We are carrying on the distillery business, and buying spirits, and hope soon to have the chance of making you a good shipment from this place. T. Thomas and ourselves have on board the Herald ninety casks of spirits shipped to you.

There is a great chance here for any English vessel that comes and *can get in to this place clear of the Federal men-of-war.* When they fall in with an English vessel bound to a Southern port | they *only* order p. 772 them off, and not let them enter. There is no blockade at this place that can be considered *as such* up to this time. There has been but one steamer, off this place, near enough to see the hull, and no time near enough to tell what she was by her colors. *There has been a smoke seen off in the offing at one time, and it was thought to be one of the blockading squadron ;* can't say whether it was one or not. I see no difficulty for your vessels ; if they should be ordered off, they could go elsewhere, *and if they get in they can get a splendid freight.*

Very respectfully, yours, &c.,

THOMAS DUNCAN & Co.

The libel demanded the forfeiture of the brig and cargo as prize of war. The master prayed restoration of the vessel in behalf of six alleged owners, all British subjects, of whom five were domiciled in Nova Scotia, and one in New York. He also prayed restitution of a part of the cargo, which consisted wholly of turpentine, tar, rosin, and tobacco, products of North Carolina or Virginia, in behalf of owners living in North

Carolina; and of another part, in behalf of persons believed to have an interest, residing in New York, South Carolina, and in England. Restitution of the rest of the cargo was claimed by Williams, already mentioned as a merchant, native and resident of New York. *No proof of ownership of cargo was made,* except in behalf of Williams and the parties living in North Carolina.

Condemned, as already mentioned, by Grier, J., the case was now here for review.

Mr. Assistant Attorney-General Ashton, for the United States; Mr. Donnohue, contra.

The CHIEF JUSTICE delivered the opinion of the court.

The principal question in this case is, was the brig lawful prize? She was a neutral vessel, and the answer to the question must depend on her employment at the time of capture.

p. 773 The actual establishment of the effective blockade of the | ports of North Carolina, in pursuance of the President's proclamation of the 27th of April, 1861, was notified by Commodore Prendergast on the 30th April; and it is a matter of history that the notification, as well as the proclamation, became at once well known throughout the country. It is impossible to believe that the master of the Herald, at Boston, on the 22d May, could have been ignorant of facts so notorious. His conduct on arrival near Beaufort strongly indicates his apprehension of capture. The lights at the entrance of the harbor had been destroyed by the insurgents, and yet, though arriving in the morning of the 9th, he lay off and on, some twenty miles south, all that day, and went in during the succeeding night.

We know of no case of prize in which a captured vessel has been restored under such circumstances; but we need not rest the decision of this case upon this evidence of attempt to enter a blockaded port.

The vessel, when once within the harbor, proceeded to take in a cargo. Some difficulties were encountered from the action of the rebel military authorities, and from the disturbed condition of the country; but the lading was at length completed, and the vessel sailed, as already stated.

During the month which elapsed from arrival till departure, the effectiveness and stringency of the blockade were materially increased. The master, it is true, asserts that he still remained ignorant of its existence; but the evidence shows that it was the common topic of conversation in Beaufort and Morehead City; and he says himself that, while he was taking in cargo, about three weeks before sailing, he saw from the tops of the buildings, with a glass, a man-of-war off the harbor. It remained there, for he saw the same vessel about one week before sailing. Another witness, a hand on the brig, says, during the time the vessel was lying at Beaufort, he saw three different men-of-war off the

harbor; and during the last two weeks he saw a man-of-war as often as once in three days. A letter from one of the shippers of the cargo, found on the brig, informs his correspondent that 'a smoke had been seen off in the | offing at one time, and it was thought to be one of the p. 774 blockading squadron.'

It would be difficult to make more conclusive proof of the existence of the blockade, or of notice of the fact to the master of the captured vessel.

The cargo was shipped to be conveyed from the port by this brig, and was in the same offence.

The facts of the case supply other grounds of condemnation. The shares of the vessel owned in New York, and the portions of the cargo belonging to Williams, of New York, might be condemned for trading with the enemy; and other portions of the cargo might be condemned as enemy's property; but it is enough that vessel and cargo were equally involved in the attempt to violate the blockade. Both were rightfully captured.

DECREE AFFIRMED.

The Nassau.

(4 Wallace, 634) 1866.

1. The jurisdiction of a court of admiralty over a vessel captured *jure belli*, is determined by the fact of capture. The filing of a libel is not necessary to create it.
2. When, under the act of Congress of the 25th March, 1862, for the better administration of the law of prize (12 Stat. at Large, 374), the prize commissioners authorized by the act certify to a District Court that a prize vessel has arrived in their district, and has been delivered into their hands, this is sufficient evidence to the court that the vessel is claimed as a prize of war and in its jurisdiction as a prize court.
3. Demands against property captured as prize of war must be adjusted in a prize court. The property arrested as prize is not attachable at the suit of private parties. If such parties have claims which, in their view, override the rights of captors, they must present them to the prize court for settlement.
4. Whether a maritime lien for work and materials alleged to have been furnished to a vessel prior to her capture *jure belli* is lost by such capture, is a proper subject for investigation and decision by the prize court before which the captured vessel is brought for adjudication; and which the parties setting up such lien can, on presentation of their claim to that tribunal, properly have decided. |
5. But if such parties do not so present and ask to have it decided, the question is p. 635 not properly before this court for review, in a case where the District Court has only dismissed the libel as improperly filed on its instance side.

APPEAL from the Circuit Court of the United States for the Southern District of New York; the case being thus:

On the 17th of June, 1862, Harlan, Hollingsworth & Co., a mercantile firm doing business at Wilmington, Delaware, filed a libel in admiralty,

on the instance side of the District Court for the Southern District of New York, against the steamship Nassau, then in the port of New York, for repairs done to, and materials furnished for, the said vessel, in June, 1860. On the same day, in obedience to a monition properly issued, the marshal attached the vessel, and made return that she was at the time in the custody of the prize commissioners. Afterwards, on the 27th day of June, the prize commissioners certified that the steamer, an alleged prize of war, arrived at the port of New York on the 2d day of June, and was delivered into their hands, and was then in their custody. These commissioners, it may be here stated, were officers acting under the authority of an act of Congress,[1] which directs, that when any property captured as prize is brought into any district of the United States for adjudication, it shall be the duty of the prize commissioners to receive and keep it until by proper process of the court it shall be placed in the custody of the marshal.

A motion having been made by the district attorney, intervening for the United States, to dismiss the libel—on the ground that a vessel under arrest as prize of war was within the cognizance of the prize court, and could not be attached in a private action, and that all legal and equitable demands against her must be adjudicated in the prize court—the District Court sustained the motion, and dismissed the libel; and the Circuit Court on appeal, affirmed the decree. The case was now brought here to review that decision; the libellants insisting that the order of dismissal was without authority of law. |

p. 636 *Mr. J. T. Williams, for the appellants:*

It will be readily inferred from the dates in this case—and the fact will doubtless be conceded to be so—that it was in consequence of the Rebellion, and the suspension of the authority of the Federal courts in the Southern ports, the ports between which the Nassau was doubtless plying,—that the libellants were forced to wait from June, 1860, when the repairs, which are the foundation of this suit, were made, till June, 1862, when they filed their libel, before they could pursue their claim. In the beginning of our civil war the vessel, no doubt, sailed from a Southern port, and nothing more seems to have been heard of her by these libellants who had given their labor to her until June, 1862, when she came into the port of New York, and was delivered into the hands of the 'prize commissioners.' The case shows that thereupon, immediately, on the 17th June, 1862, *and before any prize suit had been commenced*, or the prize commissioners had certified that she was in their hands, the libellants filed their libel in the District Court for New York, setting up *their* claim and maritime lien, and praying the usual process and sale for payment.

For the purposes of the present argument, the claim of the libellants

[1] Act of 25th March, 1862, 12 Stat. at Large, 374.

must, of course, be taken to be just and legal, and one that would have been pronounced for, had not the libel been, at the instance of the government, summarily dismissed. The government cannot here argue that the claim was unjust or doubtful, and so *beg* the question upon a hearing of which it has deprived the party asserting the claim.

This being so, is it law—while a vessel is in the hands of prize commissioners, no otherwise than as an *alleged* prize of war—it not being shown how she came into the hands of such commissioners, nor in any respect how, or on what, the government claim is founded—that no private citizen can proceed against her in a civil action, to bring her into the District Court upon a claim confessedly legal and meritorious ?

Such a proposition cannot be maintained. |

At the time when the libellants filed their libel for repairs and materials, p. 637
no libel in prize had been filed. The vessel was not within the jurisdiction of any court. Certainly, *until* a libel in prize had been filed, any one had a right to proceed against the vessel for a meritorious claim. Suppose the government had never filed a libel. How then ? This libel of ours was not only filed before the government filed any of theirs, but, for aught that appears, before it had a design of filing one. Even the commissioners had not acted.

Of course, there can be no pretence of a conflict of jurisdiction. The libellants did not seek to take the vessel *out* of the jurisdiction of one court and bring her into the jurisdiction of another. They first brought her within the jurisdiction of a court having general jurisdiction, not only of their claim, but of the claims of their antagonists.

It cannot be questioned that the District Courts of the United States have concurrent jurisdiction in prize as well as in admiralty. The jurisdiction of the prize court in *England*—which is a special jurisdiction, conferred by a special commission from the Crown, and only when the exigencies of war seem to require it—extends, no doubt, *only* to cases of prize. But in this country prize courts and the courts of admiralty are blended—consolidated under one and the same statutory jurisdiction—and although the practice in prize cases varies somewhat, in some particulars, from that which obtains in admiralty cases, the jurisdiction is one and the same.

The Judiciary Act [1] provides that the District Courts shall ' have exclusive original cognizance of all civil causes of admiralty and maritime jurisdiction ; ' and similar provision is made by the act of 1812, ' concerning letters of marque, prize, and prize goods,' [2] which enacts that ' the District Courts of the United States shall have exclusive original cognizance of all prizes brought into the United States, as in civil causes of admiralty and maritime jurisdiction.' |

[1] § 9.

[2] § 6, Stat. at Large, 761.

p. 638 In *Glass* v. *Sloop Betsey*,[1] which was a decision prior to the act of 1812, the court say :

'The truth is, Admiralty is the *genus ;* Instance and Prize Courts are the *species,* comprehended in the grant of admiralty jurisdiction.'

We must beware, then, how we attempt to apply to our courts the dicta, or even the adjudications, of English tribunals. The foundations of the respective jurisdictions being wholly different, nothing but confusion and error can, by such attempts, ensue.

These matters being settled, we may confidently argue that no title, whether it be derived from capture as prize of war or otherwise, can be higher than that which is acquired by purchase. Whatever may be the legal altitude of the claim of the government to the vessel in question, a citizen may ask of a court that it hear him as a citizen suitor, asserting a superior prior claim to the whole, or some portion of it ; and his claim, in such a case, ought not to be dismissed without a hearing.

Between a claim from purchase and a lien for repairs made in good faith, in furtherance of the public interest, in full reliance upon a universal principle of law, which has had the sanction of all nations for a thousand years—law which, unlike a contract, bends to no local interpretation, but is alike uniform and universal—there can be no essential difference.

But were it never so well settled that a *valid* prize claim overrides a lien and claim like that of the libellants, no one will pretend that an *invalid* prize claim will have the same effect. And will the court assume that this ' prize claim ' was valid when no fact appears upon the record to show it, and the government was not able to assert that the vessel was anything more than ' an *alleged* prize of war ? ' Or assume that, had the libellants been permitted to do so, they would not have been able to show
p. 639 that this *alleged* claim was not a | valid one ? If invalid, can the government be heard to dispute the claim of the libellants ?

What the libellants did in this case was in accordance with ancient practice. A vessel can be libelled by as many and as various parties and actions as a man can be sued by. Coming in as a claimant or petitioner in the suit of another is permitted only in special cases, and the practice is not favored. It was competent for the government to intervene in the suit of the libellants, and to contest the validity of their claim and lien, on whatever ground they saw fit, and, if successful, they had the field to themselves, so far as the libellants were concerned. They could probably, even in that suit, have asked for a sentence of condemnation of the vessel ; or, perhaps more orderly, they should have filed a separate libel for that purpose. But the libellants had no possible way of presenting their claim to the adjudication of the court but by filing an original libel. It cannot be suggested that their situation would have been better if

[1] 3 Dallas, 12.

they had waited till after the government had filed its libel. As we have already asked, what if the government had never done so? Or how can it be said that the government had a right to file its libel first; or that, if the libellants had filed theirs after the government had filed its, a motion to dismiss would not have been granted with equal propriety?

The action of the District Court proceeded, of course, on the ground that a prize condemnation had the effect to efface all maritime liens; the court forgetting that a prize condemnation had not taken place, and that there was as yet no evidence upon which the court could pronounce such condemnation.

II. A valid claim to a vessel as prize of war, does not efface or override the claim or lien upon her, given to a material-man by the general maritime law.

The principle that a forfeiture, as prize, has no such effect upon a ma itime lien given by the general maritime law, was admitted by Sir William Scott, in the *Vrow Sarah*,[1] | also in *The Constantia*,[2] and claims p. 640
founded on such liens were allowed, even in an English prize court. In *The Belvidere*, the same learned judge admitted that prize did not override a 'positive lien upon the ship.'

The Tobago, and some other cases cited upon the brief of the other side, are distinguishable.

[The learned counsel then went into a critical and very learned examination of these cases, endeavouring to distinguish them from the present.]

Mr. Ashton, Assistant Attorney-General, contra:

1. The vessel having been, at the time of the filing of the libel, in the possession of the prize commissioners, was in the custody of the law, and subject only to the orders and decrees of the *prize* court of admiralty.[3]

2. Whether a mere lien on property captured *jure belli* is or is not an interest sufficient to support a claim in a court of prize—a point that opposing counsel have argued so learnedly—is a question which really does not arise in the case as it now stands here. The District Court—*as an instance court of admiralty*—had no jurisdiction of the libel filed by these libellants in a case where the vessel had been captured and was plainly about to be proceeded in as prize of war. The point made need not, therefore, be replied to.

Yet we apprehend it to be clear, on the authority of American not less than of English cases,[4] that such mere lien is not maintainable on

[1] Referred to in a note in 1 Dodson's Admiralty, p. 355–6.
[2] Edwards, 232.
[3] 1 Kent's Commentaries, 101–103, and cases cited; Act of March 25, 1862.
[4] The Eenrom, 2 Robinson, 5; The Tobago, 5 Id. 222; The Marianna, 6 Id. 24; The Frances (Thompson's Claim), 8 Cranch, 335; Id. (Irvin's Claim), Id. 418; Bolch *v.* Darrell, Bee, 74; The Mary, 9 Cranch, 126.

the prize side of the District Courts against the vessel, or the proceeds thereof, and hence that the order of the court below dismissing the one set up in this case, was right.

Mr. Justice DAVIS delivered the opinion of the court.

p. 641 It is the practice with civilized nations, when a vessel is | captured at sea as a prize of war, to bring her into some convenient port of the government of the captor for adjudication. The title is not transferred by the mere fact of capture, but it is the duty of the captor to send his prize home, in order that a judicial inquiry may be instituted to determine whether the capture was lawful, and if so, to settle all intervening claims of property. Until there is a sentence of condemnation or restitution, the capture is held by the government in trust for those who, by the decree of the court, may have the ultimate right to it.

But it is argued that the libel in this case was sustainable, because no libel in prize had been filed, and until this was done any one had the right to proceed against the vessel for a meritorious claim. If this were so, it would greatly lessen, with captors, the stimulus to activity so necessary in time of war, for they could never tell how many private actions they would have to defend before they could reap the fruits of their enterprise and valor. Sound policy, as well as the law of prize, therefore, requires that all demands against captured property must be adjusted in a prize court, and that the property arrested as prize shall not be attachable at the suit of private parties. If such parties have claims which, in their view, override the rights of captors, they must present them to the prize court for settlement.

The fact of capture determines the jurisdiction, and not the filing of a libel. When captured as prize of war the property is in the custody of the law, and remains there to await the decision of a prize court, and, if condemned, all claims to the property are by it adjusted. Any other rule would work great hardship to captors, and tend to cripple the operations of government during time of war. Under the provisions of the act of Congress for the better administration of the law of prize,[1] it is directed that, whenever any property captured as a prize is brought into any district of the United States for adjudication, it shall be the duty of the

p. 642 prize commissioners to receive it and keep it, until by | the proper process of the court, it shall be placed in the custody of the marshal of the district.

When, therefore, in this case, the prize commissioners certified to the court below that the prize steamer Nassau had arrived in the District of New York, and was delivered into their hands, there was sufficient evidence before the court that the vessel was claimed as prize of war, and in the jurisdiction of a prize court; and the motion to dismiss this libel, filed by private parties, was properly entertained and decided.

[1] 12 Stat. at Large, 374.

Whether a maritime lien, like the one in this case, is lost, when the property is captured *jure belli*, would have been a proper question for investigation and decision by the prize court that condemned the Nassau, and which the libellants, on presentation to that tribunal, could have had decided.

Not having done so, the question is not before this court for review.

The decree of the Circuit Court is

AFFIRMED.

The Springbok.

(5 Wallace, 1) 1866.

1. Though invocation, in prize cases, is not regularly made on original hearing, but only after a cause has been fully heard on the ship's documents and the preparatory proofs, and where suspicious circumstances appear from these; yet where the court below, in the exercise of its discretion, has allowed it on first hearing, the decree will not necessarily be reversed; decrees of condemnation having passed in both the cases invoked, one *pro confesso* and the other by a decree of the highest appellate court.
2. Where the papers of a ship sailing under a charter-party are all genuine and regular, and show a voyage between ports neutral within the meaning of international law; where there has been no concealment nor spoliation of them; where the stipulations of the charter-party in favor of the owners are apparently in good faith; where the owners are neutrals, have no interest in the cargo, and have not previously in any way violated neutral obligations, and there is no sufficient proof that they have any knowledge of the unlawful destination of the cargo,—in such a case, its aspect being otherwise fair, the vessel will not be condemned because the neutral port to which it is sailing has been constantly and notoriously used as a port of call and transshipment by persons engaged in systematic violation of blockade and in the conveyance of contraband of war, and was meant by the owners of the cargo carried on this ship to be so used in regard to it.
3. The facts that the master declared himself ignorant as to what a part of his cargo, of which invoices were not on board (having been sent by mail to the port of destination), consisted,—such part having been contraband; and also declared himself ignorant of the cause of capture, when his mate, boatswain and steward all testified that they understood it to be the vessel's having contraband on board,—*held* not sufficient, of | themselves, to infer guilt to the owners of the vessel, in no way compromised with the cargo. But the misrepresentation of the master as to his knowledge of the ground of capture, *held* to deprive the owners of costs on restoration. p. 2
4. A cargo was here condemned for intent to run a blockade, where the vessel was sailing to a port such as that above described, the bills of lading disclosing the contents of 619 packages of 2007, which made the cargo, the contents of the remaining 1388 being not disclosed; where both they and the manifest made the cargo deliverable to order, the master being directed by his letter of instructions to report himself on arrival at the neutral port to H., who 'would give him orders as to the delivery of his cargo;' where a certain fraction of the cargo whose contents were undisclosed was specially fitted for the enemy's military use, and a larger part capable of being adapted to it; where other vessels owned by the owners of the cargo, and by the charterer, and sailing

ostensibly for neutral ports were, on invocation, shown to have been engaged in blockade-running, many packages on one of the vessels, and numbered in a broken series of numbers, finding many of the complemental numbers on the vessel now under adjudication; where no application was made to take further proof in explanation of these facts, and the claim of the cargo, libelled at New York, was not personally sworn to by either of the persons owning it, resident in England, but was sworn to by an agent at New York, on 'information and belief.'

APPEAL from a decree of the District Court of the United States for the Southern District of New York, respecting the British bark Springbok and her cargo, which had been captured at sea by the United States gunboat Sonoma during the late rebellion, and libelled in the said court for prize.

The vessel was owned by May & Co., British subjects, and was commanded by James May, son of one of the owners.

She had been chartered 12th November, 1862, by authority of May, the captain, to T. S. Begbie, of London, to take a full cargo of

'Lawful merchandise, and therewith *proceed to Nassau, or so near thereunto as she may safely get, and deliver same,* on being paid freight as follows, &c.: The freight to be paid one-half in advance on clearance from custom-house, subject to insurance, and the remainder in cash *on delivery.* Bills of lading are to be signed by master at current rate of freight, if required, without prejudice to this charter-party. It being agreed that master or owners have absolute lien on cargo for all freight, dead freight, |
p. 3 demurrage, or other charges. The ship is to be consigned to the *charterer's agent at port of unloading,* free of commission. Thirty running days are allowed the freighter for loading at port of loading and *discharging at Nassau.*'

This document had an indorsement on it by Speyer & Haywood, persons hereinafter described.

The letter of instructions to the master was thus:

'LONDON, December 8, 1862.

'CAPTAIN JAMES MAY.

'*Dear Sir,*—Your vessel being now loaded, you will proceed *at once to the port of Nassau, N. P., and on arrival report yourself to Mr. B. W. Hart there, who will give you orders as to the delivery of your cargo* and any further information you may require.

'We are, dear sir, &c.,

'SPEYER & HAYWOOD,

'For the Charterers.'

The letter to the agent of the consignee, directed 'B. W. Hart, *Nassau,*' and from these same persons, Speyer & Heywood, was thus:

'*Under instructions from Messrs. Isaac, Campbell & Co.,* of Jermyn Street, we inclose you bills of lading for goods shipped per Springbok, consigned to you.'

The London custom-house certificate was 'from London *to Nassau*;'

the certificate of clearance declared the 'destination of voyage, *Nassau, N. P.;*' and the manifest was of a cargo from 'London *to Nassau.*'

The log-book was headed, 'Log-book of the bark Springbok, on a voyage from London *to Nassau.*'

The shipping articles, November, 1862, were of a British crew, '*on a voyage from London to Nassau, N. P.*; thence, if required, to any *other port* of the West India Islands, *American ports*, British North America, east coast of South America and back to the final port of discharge in the United Kingdom or continent of Europe, between the Elbe and Brest, and finally to a port in the United Kingdom; voyage probably under twelve months.' |

The cargo, valued at £66,000, was covered by three bills of lading p. 4
(of which two were duplicated, the duplicates marked Captain's copies), as follows:

Bill of lading marked No. 2, showed '666 packages merchandise,' shipped by Moses Brothers, to be delivered, &c., at port of Nassau, N. P., unto order —— or to —— assigns, he or they paying freight, *as per charter-party*. It was indorsed by Moses Brothers in blank. This bill of lading on its face showed 150 chests and 150 half-chests tea, 220 bags coffee, 4 cases ginger, 19 bags pimento, 10 bags cloves, and 60 bags pepper—in all, 613 packages. The remaining 53 were entered as *cases*, *kegs*, and *casks*. These 53 packages were found, when the cargo was more closely examined, to contain *medicines* and *saltpetre*; matters at that time much needed in the Southern States, then under blockade.

Bill of lading No. 3, showed one bale and one case shipped by Speyer & Haywood, to be delivered at Nassau, unto order —— or to —— assigns, &c., paying freight as per *charter-party*.

Bill of lading No. 4, showed 1339 packages shipped by Speyer & Haywood to Nassau, as above. These 1339 packages were also described as *cases, bales, boxes*, and *a trunk*. This was also indorsed in blank.

The manifest gave no more specific description of the character of the cargo. It was signed Speyer & Haywood, brokers, and showed that the whole cargo was consigned to 'order.'

An examination of the packages in bills Nos. 3 and 4 showed 540 pairs of 'gray army blankets,' like those used in the army of the United States, and 24 pairs of 'white blankets;' 360 gross of brass navy buttons, marked 'C. S. N.,'[1] 10 gross of army buttons, marked 'A.,'[2] 397 gross of army buttons, marked 'I.,'[3] and 148 gross of army buttons, marked 'C.,'[4] being in all 555 gross; all the buttons were stamped on the other side, 'Isaac, Campbell & | Co., 71 Jermyn st., London.' There were 8 cavalry p. 5
sabres, having the British crown on their guards; 11 sword bayonets,

[1] Confederate States Navy ?
[2] Artillery ?
[3] Infantry ?
[4] Cavalry ?

992 pairs of army boots, 97 pairs of russet brogans, and 47 pairs of cavalry boots, &c.

The vessel set sail from London, December 8th, 1862, and was captured February 3d, 1863, making for the harbor of Nassau, in the British neutral island of New Providence, and about 150 miles east of that place. The port, which lay not very far from a part of the southern coast of the United States, it was matter of common knowledge had been largely used as one for call and transshipment of cargoes intended for the ports of the insurrectionary States of the Union, then under blockade by the Federal government.[1] The vessel when captured made no resistance; and all her papers were given up without attempt at concealment or spoliation.

Being brought into the port of New York, and libelled there as prize, February 12, 1863, a claim was put in on the 9th of March following, by Captain May for his father and others as owners of the vessel. On the 24th of the same month a claim for the whole cargo was put in for Isaac, Campbell & Co., and also for Begbie, through one Kursheet, their 'agent and attorney;' Kursheet stating in his affidavit in behalf of these owners, that 'it is impossible to communicate with them *in time to allow them to make the claim and test affidavit herein.*' His affidavit stated farther,

'That, as he *is informed and believes*, it was not intended that the barque should attempt to enter any port of the United States, or that her cargo should be delivered at any such port, but that the only destination of such cargo was Nassau aforesaid, where the said cargo was *to be actually disposed of, and proceeds remitted to said claimants.*

'That, as he *is informed and believes*, the cargo was not shipped in pursuance of any understanding, either directly or indirectly, with any of the enemies of the United States, or with any person or persons in
p. 6 behalf of or connected with the so-called Confederate | States of America, but was shipped with the full, fair, and honest intent to sell and dispose of the same absolutely in the market of Nassau aforesaid.

'That *his information is derived from letters and communications very lately received by this deponent from the aforesaid claimants*, and from documents in deponent's possession, placed there by said claimants, and that *such* communications *authorize this deponent to intervene and act as agent as well as proctor and advocate for the said claimants as to the above cargo.*'

The master, mate, and steward, were examined as witnesses *in preparatorio:*

The master stated, that the goods were to be delivered at Nassau for account and risk of Begbie & Co., London, the charterers; that he did not know that the laders or consignees had any interest in the goods; that he knew nothing of the qualities, quantities, or particulars of the goods or to whom they would belong if restored and delivered at the destined port; that he was not aware that there were goods contraband

[1] See the Bermuda, 3 Wallace, 514.

of war on board; that, as he believed, *invoices* and duplicate bills of lading were sent to Nassau by mail steamer; that there were no false bills of lading, nor any passports or sea-briefs other than the usual register and ship's papers, which were entirely true and fair; that *he did not know on what pretence she was captured*; that there were no persons on board owing allegiance to the United States; that on the vessel's previous voyage, she went from London to Jamaica, carrying general merchandise, and returned direct, carrying principally logwood.

The mate, who to a greater or less extent confirmed these statements, swore that the cargo was a general cargo; casks, bales, boxes, and bags; that he had no knowledge, information, or belief as to what was contained in them, and had never heard. He knew of no goods contraband of war; no arms or munitions of war that he knew of. 'The seizure,' he stated, 'was made on *the supposition that the cargo was contraband of war.*'

The boatswain testified to the same purpose of the voyage; that the vessel had no colors but English aboard; that the | cargo was general, in p. 7
bales, cases, and bags, that he did not know their contents and never had heard them stated; and that *he* 'understood the seizure was made because the bills of lading *did not show what was in some of the cases on board.*'

The steward, that he 'understood the vessel was captured *because we had goods contraband of war aboard*; had heard no other reason given.'

Upon the hearing in the District Court, the counsel for the captors invoked into the case the proofs taken in two other cases, on the docket of that court for trial at the same time with the present one, the cases, namely, of *United States* v. *The Steamer Gertrude*, and *United States* v. *The Schooner Stephen Hart.*

The Hart was captured on the 29th of January, 1862, between the southern coast of Florida and the Island of Cuba. The claimants of her whole cargo were the firm of Isaac, Campbell & Co., the same persons who claimed, jointly with Begbie, the cargo of the Springbok. It also appeared in the case of the Hart, that the brokers who had charge of the lading of her cargo were Speyer & Haywood, the same parties who appeared as brokers of the cargo in the present case, and as shippers of a part of it, and as agents for Begbie and for I., C. & Co. It appeared, in the case of the Hart, that I., C. & Co. were dealers in military goods, and that the entire cargo of that vessel, consisting of arms, munitions of war, and military equipments, was laden on board of her in England, under the direction of I., C. & Co., in co-operation with the agents, at London, of the 'Confederate States,' with the design that the cargo should run the blockade into a port of the enemy, either in the Hart, or in a vessel into which the cargo should be transhipped at some place in Cuba, and that I., C. & Co. intrusted to the agent of the 'Confederate

States' in Cuba, the determination of the question as to the mode in which the cargo should be transported into the enemy's port. The cargo of the Hart had been condemned by the Supreme Court, as lawful prize, at the last term.[1] |

p. 8 The Gertrude was captured on the 16th of April, 1863, in the Atlantic Ocean, off one of the Bahama Islands, while on a voyage ostensibly from Nassau to St. John's, N. B. The libel was filed against her on the 23d of April, 1863, and she was condemned, with her cargo, as lawful prize, on the 21st of July, 1863. No claim was put in to either the Gertrude or her cargo. The testimony showed that she belonged to Begbie; that her cargo consisted, among other things, of hops, dry goods, drugs, leather, cotton cards, paper, 3960 pairs of gray army blankets, 335 pairs of white blankets, linen, woollen shirts, flannel, 750 pairs of army brogans, Congress gaiters, and 24,900 pounds of powder; that she was captured after a chase of three hours, and when making for the harbor of Charleston, her master knowing of its blockade, and having on board a Charleston pilot under an assumed name.

The marshal's report of the contents of the packages on board of the Springbok, and of the prize commissioners' report of the contents of the packages of the Gertrude, disclose the following facts:

The report in the case of the Springbok specified '18 bales of army blankets, butternut color,' each marked *A*, *in a diamond*, and numbered 544 to 548, 550, 552, and 555 to 565. The report in the case of the Gertrude showed a large number of bales of 'army blankets,' each marked *A*, *in a diamond*, and numbered with numbers, scattered from 243 to 534, and then commencing to renumber at 600.

In the cargo of the Springbok was found a bale marked *A*, *in a diamond*, and numbered 779; while in the cargo of the Gertrude were found bales each marked *A*, *in a diamond*, and numbered 780, 782, 784, 786, 788, 789 to 799.

In the Springbok were found 9 cases, each marked *A*, *in a diamond*, and numbered 976 to 984, and 4 bales, each marked *A*, *in a diamond*, and numbered 985 to 987 and 989, by the same marks; the 4 bales being
p. 9 stated to be 'men's colored travelling | shirts.' In the Gertrude were found 5 bales, each marked *A*, *in a diamond*, and numbered 998, 990, to 992 and 998, and described as 'men's colored travelling shirts.' In the Hart were 4 cases of men's white shirts, each marked *A*, *in a diamond*, and numbered 994 to 997.

So, also, in the Springbok were found packages, each marked *A*, *in a diamond, S. I., C. & Co.*, and numbered irregularly and with considerable *hiatûs*, from 1221 up to 1440. But there was no 1285 among them, the *hiatûs* being from 1266 to 1289, which last was the first of several

[1] 3 Wallace, 559.

having ' shirts.' On the Gertrude were packages marked *A, in a diamond,* numbered from 1170 to 1214, also one numbered 1285, and found to contain ' shirts.'

On board of the Springbok was found 1 bale of brown wrapping paper, marked *A, in a diamond, T. S. & Co.*, and numbered 264. On board of the Gertrude a large number of bales of wrapping paper and other paper, marked *A, in a diamond, T. S. & Co.*, and numbered with numbers scattered between 1 and 170.

In only one instance, apparently, so far as the testimony showed, was the same number found on a package in each cargo.

On the other hand, many marks were found on the one vessel not found on the other.

No application was made in the court below for leave to furnish further proofs.

The court below condemned *both vessel and cargo.*

Messrs. Carlisle and Edwards for the appellants, claimants in the case :

1. *As to the invocation.*—The papers in the cases of *The Hart* and *The Gertrude* were introduced against well-established principles of international law. For the well-settled rule of practice in prize is, that exclusively upon a ship's papers and the examinations *in preparatorio* the cause is to be heard in the first instance.[1] ' The evidence to acquit or condemn, with or without costs or damages, must,' says the highest English authority, ' in the first instance, come merely from | the ship p. 10 taken, viz., the papers on board and the examination on oath of the master and other principal officers.' [2]

The English cases of invocation [3] are all cases *after* further proof. The cases in our own courts coupled with invocation are to the same effect : *The George* [4] was one for further proof,—' permission to make further proof.' *The Experiment* [5] was of the same character. ' The captors,' says the case, ' have had full notice of the difficulties of their case, and *after an order for further proof,* which should awaken extraordinary diligence,' &c., &c.

And even further proof, which is the portal through which invocation must come, is rarely allowed, unless there be something in the original evidence which lays a suggestion for prosecuting the inquiry further.[6] Where the case is not liable to any just suspicion, the disposition of the court leans strongly against the introduction of extraneous matter, and

[1] The Dos Hermanos, 2 Wheaton, 76 ; The Pizarro, Id. 227 ; The Amiable Isabella, 6 Id. 1.

[2] Report of Sir George Lee, Dr. Paul, Sir Dudley Ryder, and Mr. Murray (Lord Mansfield), contained in the letter of Sir William Scott and Dr. Nicoll to John Jay, Esq. Wheaton on Captures, Appendix, 310.

[3] The Sarah, 3 Robinson, 330 ; The Vrendschap, 4 Id. 166 ; The Romeo, 6 Id. 357 ; The Zulema, 1 Acton, 14.

[4] 1 Wheaton, 408. [5] 8 Id. 261. [6] The Sarah, 3 Robinson, 330.

against permitting the captors to enter upon further inquiry. The most ordinary cases of further proof are where the cause appears doubtful upon the original papers and the answers to the standing interrogatories.

Aside from rules, the principle, in cases of invocation, is that the suit invoked from should be between the same parties.[1] In this case there is invocation of two *ex parte* reports of cargoes, made by United States prize commissioners, in the absence of claimants; and also a United States libel.

'It is essential,' says Story, J., in *The Dos Hermanos*, in this court,[2] 'to the correct administration of prize law, that the regular modes of proceeding should be observed with the utmost strictness.'

p. 11 Even depositions taken on further proof in one prize case, | cannot be invoked in another;[3] by parity, the documents invoked in the present case ought to be excluded.

2. *As respects cargo.*—The suit stands clear of blockade and of enemy property. The ship's papers are genuine; in perfect order.

It is not asserted that the bills of lading do not tally with the marks, &c. Invoices were to be sent forward, as is now customary, by steamer. An invoice is not a 'ship's paper;' a manifest is. The former is made out by a shipper to and for his own agent and consignee, so as to show price and charges. The master has no control over an invoice. Whenever it happens to be on board, it is inclosed in a sealed letter from shipper to consignee. The captain cannot know anything of cargo which is boxed up or contained in bales, save so far as they are mentioned in bills of lading, upon which he wisely puts 'Contents unknown.' The charter-party in this case was made free of commissions, so there was less requirement for an invoice. And invoices carry with them little authenticity, being easily fabricated where fraud is intended.

Even where all necessary and ordinary ship's papers are not on board (an invoice is not strictly one of them), a court will look into all circumstances before condemnation, or will allow of further proof.[4]

It is not to be forgotten that as the Springbok was going from a British port and bound to another English port, an invoice was in no way required. No duties were payable, and, therefore, an invoice was not wanted in connection with them. And the reason why the articles of tea, coffee, ginger, pimento, cloves, and pepper are specified on bills of lading was, that these articles are foreign to England, and are, by rule and custom, to be designated, from the fact of being dutiable, and the country requires to know, through periodical returns, the quantity of goods, subject to duty, which have been transshipped. |

[1] Dearle *v.* Southwell, 2 Lee, 93.
[2] 2 Wheaton, 80.
[3] The Experiment, 4 Wheaton, 84.
[4] Pratt's Law of Contraband, Introd. xii; Story, Justice, in The Amiable Nancy, 3 Wheaton, 561.

A neutral, it must be remembered, has a right to carry any kind of p. 12
merchandise from one neutral port to another neutral port. It may consist of warlike weapons and their appliances. The substance of the article does not make it contraband. It does not even get its name 'contraband' until it is going, positively moving, to an enemy's port—a hostile port. In order to constitute contraband of war, two elements must concur, viz., a hostile quality and a hostile destination. If either of these elements is wanting, there can be no such thing as contraband. Hostile goods, such as munitions of war, going to a neutral port, are not contraband.

'It would be too high for any such court of justice as this,' said Sir George Hay, in *The Hendric and Alida*,[1] 'to assert that the Dutch may not carry, in their own ships, to their own colonies and settlements, everything they please, whether arms or ammunition or any other species of merchandise, provided they do it with the permission of their own laws. And if they act contrary to them, I am no Judge of the laws of Holland. I cannot enforce them.'

Although contraband does not arise, still, supposing that the case could be tortured into a something which might have a color of contraband: what would the alleged contraband amount to?

Contraband, says Hautefeuille,[2] affects those articles only destined immediately to become in the hands of the possessors a direct means of attack and defence, that is, articles suited solely for warlike purposes, without requiring to undergo any industrial preparation or transportation to render them so; and that contraband of war is limited expressly to arms, instruments, and munitions of war, fashioned and fabricated exclusively to serve in war; and all other articles, without excepting even those substances suited for the manufacture of such prohibited articles and the instruments even | which, without having a direct use in p. 13
hostilities, can, however, be indirectly employed in them, continue the objects of free commerce on the part of neutrals, either with both the belligerents or with one of them.

The cloth in bale and the two small boxes of buttons are consequently not contraband. The buttons were made in England, and a court will not speculate upon their initials, and certainly not assume to condemn through any such mere assumption. There are British troops in Nassau; and the Island of New Providence, on which it is, had probably an Artillery, Infantry, Cavalry, and, perhaps, a Coast Survey. The letters C. S. N., A., I., and C., may mean many things innocent as well as one thing guilty.

[1] Hay and Marriot, 127.
[2] Droits et Devoirs des nations neutres, t. ii, p. 83; and see Halleck's International Law, p. 570, ch. 24, § 9.

The few kegs of saltpetre might reasonably be intended for ordinary sale, or for domestic use in Nassau : for instance, in the curing of provisions. At any rate, it would not be in quantity or value sufficient to affect a large cargo of dry goods, even if this particular article was standing alone in a gross prize case, connected with running a cargo direct to a belligerent. This small quantity, with all the rest of the cargo, was going to Nassau.

The dozen swords having the British crown upon their guards were evidently English cavalry swords, ordered by military men in Nassau. The twelve sword-bayonets were also in court, and were made for English Enfield rifles, and most probably for the use of British troops in Nassau : and they were only a dozen in all.

A reference to our treaties—our treaty with New Grenada,[1] with Guatemala,[2] with Peru[3]—show what our nation looks upon as contraband. And while ' clothes made up in the form and for military use,' may become contraband, the mere cloth uncut, in the bale, is not so construed ; nor buttons.

In the treaty between the United States and the Republic of Colombia, and in that with the Republics of Chili, of | Venezuela, and of the Peru-
p 14 Bolivian Confederation and Equador, it is provided that contraband articles shall not affect the rest of the cargo or the vessel.

But the question of contraband cannot arise ; the cargo was destined wholly for Nassau. The invocation does not materially help the case. The proof derived from the ' dovetailing ' of a few parcels on the Springbok and Gertrude is of very little significance. The whole source of the evidence is interested. The marshal and prize commissioners make out their elaborated lists with the very purpose to procure condemnation. Besides, the amount of dovetailing is far too small, to infer as a necessity a guilty purpose. Condemnations cannot be made on presumptions.

3. *As to the vessel alone.* There is not a fact which connects the Springbok herself with wrong. Where a neutral vessel is going near the shore of a belligerent, it may be best, for the sake of protection, that the master know the character of the cargo he carries ;[4] but there can be no motive or object, save so far as he has chosen to make himself liable for its safety through bills of lading, to know its character, when taking it from and having to deliver and get rid of it in another port of his own country.

In this case, its particulars were not known by the master or mate, or any one on board.

The master is the agent of the shipowner only ; he has nothing to do with the cargo.[5]

[1] Art. 17, 9 Stat. at Large, 87.
[2] Art. 16, Id. 880.
[3] Art. 23, Id. 937.
[4] The Oster Risoer, 4 Robinson, 199.
[5] Washington, J., in Ross *v.* The Active, 2 Washington's Circuit Court, 226.

Even where a cargo is made contraband by going to the enemy, the vessel, if not belonging to the owner of the cargo, will go free.

All the papers show that the master had no control of the cargo after getting to Nassau. He was to drop it there; his vessel was to be cleared, as to this cargo, at that place; and the charter-party ended there, at Nassau.

The owners of the ship had no interest in the cargo. | They were mere p. 15
common carriers, to receive freight for the performance of an ordinary and honest duty.

The modern rule is that the ship shall not be condemned for carrying even contraband goods.[1]

The penalty is applied to the vessel and its owner only where there has been some actual co-operation in a meditated fraud upon a belligerent by covering up the voyage under false papers, and with a false destination.[2]

Mr. Ashton, Assistant Attorney-General, with a brief of Mr. Coffey, contra, for the United States.

1. *As to the invocation.* No case decides that a decree will be reversed because an invocation has been made on original hearing; the suits invoked being like those where judgments have gone against the captors, and in one suit was taken *pro confesso*. In such a case, even if not technically regular, the maxim of *Quod non fieri debet factum valet*, would apply.

2. *As respects cargo.* The bills, &c., of Speyer and Haywood, 'as agents' for Isaac, Campbell & Co., written 'under instructions,' to Hart, at Nassau, show no purpose to deliver the cargo at Nassau, as the end of the voyage, and taken in connection with the fact that they are to order, were indorsed in blank, and that no invoices were found on the ship, sustain the conclusion that there was an ulterior destination, and that Nassau was but a port of transshipment.

That Begbie had an interest in the whole cargo appears by the fact that all the bills of lading call for the payment of freight as by the charter-party; and the vessel was undoubtedly chartered by him to carry the cargo, all of which was owned by him and Isaac, Campbell & Co. The numbers of the parcels on the Springbok and the Gertrude are complements, and the voyages of all the vessels were parts of a single transaction. |

In the commercial enterprise, therefore, in which ship and cargo p. 16
were captured, they were proceeding with false papers to a false destination; a valuable part of the cargo was what, notwithstanding the quotation, on the other side, from Hautefeuille, was certainly contraband of

[1] The Neutralitet, 3 Robinson, 295; and see Carrington *v.* The Merchants' Ins. Co., 8 Peters, 519; The Imina, 3 Robinson, 167; The Caroline, 6 Id. 462.
[2] Carrington *v.* The Merchants' Ins. Co., *supra*.

war, manufactured expressly for, and proceeding directly to, enemy use : all of the ship's papers were prepared to conceal the fact that part of the cargo was contraband.

This purpose of concealment appears, too, from the absence of the invoices of cargo. The invoices and duplicate bills of lading were not carried on the vessel, but were to be sent to Nassau by mail steamer. That the whole cargo was owned in common, is also shown by the letters of Speyer & Haywood to Captain May and W. S. Hart ; by their indorsement on the charter-party, and by their signature to the manifest.

Isaac, Campbell & Co., who, it is plain, by what is stamped on the buttons, are manufacturers and dealers in military goods in London, were the owners of the whole cargo of the Hart, condemned as prize of war ; the proceedings in which case have been invoked into this. Speyer & Haywood were the brokers who had charge of the lading of the Hart. The cargo of that vessel consisted of arms, equipments, and munitions of war, laden in England under the direction of I., C. & Co., in co-operation with agents, at London, of the rebel authorities, for the purpose of running the blockade, the question of transshipment to be decided by a rebel agent at Cuba.

That case, with the case of the Gertrude, show that the cargoes of the Springbok, the Hart, and the Gertrude, were, in fact, part of a single commercial venture, divided by shipments on different vessels, but having a common ownership and destination. The dates and places of capture of all three vessels must be adverted to. The Hart was captured 29th of January, 1862 ; the Springbok, February 3d, 1863 ; the Gertrude on the 16th of April, 1863, all in guilty or suspicious regions. That the want
p. 17 of some of the regular | ship's papers, is strong presumptive evidence against a ship in time of war is shown by many writers.[1]

The force of this presumption is increased when the vessel, laden with contraband of war, with some of her usual and important papers missing, and all of them concealing the fact of contraband cargo, is found, in time of war, on the usual route of such trade, proceeding towards the enemy country.

The master was the son of one owner, and the vessel was chartered for this voyage by *his* authority. He denied, on his examination, that he knew that she had any goods contraband of war on board, and stated that she carried ' a cargo of general merchandise.' He also stated that he did not know on what pretence the capture was made.

This testimony is obviously false. The latter part of it is contradicted by the testimony of the mate, boatswain, and steward.

[1] See Halleck's Int. Law, chap. 25, sec. 25, p. 622, and cases ; 1 Kent's Com. 157 ; The Richmond, 5 Rob. 328, where Sir Wm. Scott animadverts on the concealment on the ship's papers of contraband articles.

The fact that the master attempted, by falsehood, to conceal the true ground of capture, well known to his subordinates, shows a design to withhold the truth as to the facts of the voyage, and justifies the inference that he knew, in fact, what he was bound in law to know, that part of his cargo was contraband.[1]

He signed bills of lading for 1394 packages of merchandise, the contents of only 613 of which were disclosed by the bills of lading, all of those so disclosed being innocent articles. His manifest, identifying the packages by their marks and numbers, described them only as cases, bales, boxes, chests, bags, &c. He knew of the existence of invoices, but sailed without them. These facts show that his ignorance of the character of his cargo, if real, was his own fault. But they show still more strongly that his ignorance was not real, but affected. A reason for this affectation of | ignorance was, doubtless, that he hoped thereby p. 18
to save his father's ship.

These facts implicate the vessel in the guilt of the cargo.

None of the claimants of either vessel or cargo have ventured to vindicate the innocence of the voyage by a test oath.

The master swears to the claim of the claimants of the vessel, nearly a month after the libel was filed. No reason is assigned why the claim and the facts stated therein are not verified by the oath of one of the owners.

As a trustworthy source of information to a prize court, Mr. Kursheedt's affidavit is entitled to no respect whatever; not because Mr. Kursheedt is unworthy of belief, but because he has, and can have, no personal knowledge on the subject about which he swears; and because those who have the requisite personal knowledge refuse to subject themselves to the test of an oath, even to save a cargo so valuable, and attempt to palm upon the prize court their unsupported statements at secondhand. And this insult to the court is aggravated by the excuse offered, that in six weeks it was impossible to communicate with them (at London) in time to allow them to make the claim and test affidavit.

The case rests on the following propositions of fact and law, which, it is submitted, the evidence and authorities sustain.

1. *The cargo* was prize, because the Springbok, when captured, was pursuing a voyage laden with a cargo intended to be transshipped to the enemy's blockaded port at its port of real destination.

Because the cargo was largely contraband of war, consisting of articles all of which were specially suited for enemy use, and destined to an enemy port for such enemy use, by transshipment at Nassau, but without any sale or change of ownership at Nassau.

Because, therefore, the cargo was taken on a voyage having, so far

[1] See the Oster Risoer, 4 Robinson, 199; Mosely on Contrabands, 97, 98.

as the cargo was concerned, its *terminus a quo* at London, and its *terminus ad quem* at the blockaded and enemy port, and any existing purpose to
p. 19 touch and transship | the cargo at Nassau, in prosecution of that voyage, did not, as to the cargo, break the continuity of its voyage to the blockaded and enemy port.[1]

That part of the cargo not contraband of war was good prize, not only for the foregoing reasons, but for the further reason that it was owned by the owners of the contraband part.[2]

2. *The vessel was good prize*, because she was in the sole act of transporting the cargo destined for the blockaded port one stage of its route to that port. For this purpose she was chartered by the owner of the contraband and other goods, and, when captured, was sailing on the route by which trade to the blockaded and enemy port was then usually conducted, in pursuance of the charter and in furtherance of that purpose, under the exclusive orders of the charterer.[3]

Because she was carrying contraband of war destined for enemy use, under a charter made for that purpose, and, of course, with the knowledge of the owner of the vessel; carrying it also with a false destination. These facts make the owner of the vessel a party to the fraud, and implicate it in the guilt of the cargo. See *The Neutralitet*,[4] where the owner chartered the ship for contraband trade; *The Franklin*,[5] where the ship was carrying contraband, with a false destination, and where Sir William Scott said that the relaxation of the ancient rule, which condemned the ship with the cargo, can only be claimed by *fair* cases; *The Ranger*,[6]
p. 20 where he said, 'If the owner (of the ship) will place his property | under the absolute management and control of persons who are *capable* of lending it to be made an instrument of fraud in the hands of the enemy, he must sustain the consequences of such misconduct on the part of his agent;' *The Baltic*,[7] where the ship was condemned because 'the owner must have been aware of the fraud intended, if not a confidential party to it.'[8]

[1] The Maria, 5 Robinson, 365; The William, Id. 385; The Thomyris, Edwards, 17; The Minerva, 3 Robinson, 229; The Richmond, 5 Id. 325; The Commercen, 1 Wheaton, 382; Jecker *v.* Montgomery, 18 Howard, 110–115; The Nancy, 3 Robinson, 122; The United States, Stewart's Adm. Rep. 116.

[2] Halleck's Int. Law, chap. 24, § 6, p. 573, and authorities cited; 3 Phillimore, Int. Law, § 277; 2 Wildman, Int. Law, 217; The Sarah Christina, 1 Robinson, 237.

[3] See cases cited to third point; also, The Maria, 6 Robinson, 201; The Charlotte Sophia, Id. 204, note 1; Instructions of Navy Department of 18th August, 1862; Upton's Prize, 450, 3d ed.

[4] 3 Robinson, 296.

[5] Id. 217.

[6] 6 Id. 126.

[7] 1 Acton, 25.

[8] The Jonge Margaretha, 1 Robinson, 189; The Mercurius, Id. 288, and note; The Jonge Tobias, Id. 329; The Neptunus, 3 Id. 108; The Eenrom, 2 Id. 1; The Edward, 4 Id. 68; The Oster Risoer, Id. 200; The Carolina, Id. 260; The Richmond, 5 Id. 325; The Charlotte, Id. 275; The Ringende Jacob, 1 Id. 89; Carrington *v.* The Merchants' Insurance Co., 8 Peters, 520.

The CHIEF JUSTICE delivered the opinion of the court.

We have considered the case with much care, not only upon the ship's papers and the preparatory proofs, but upon the documents invoked on the hearing in the District Court from the two causes, *United States* v. *The Steamer Gertrude*, and *United States* v. *The Schooner Stephen Hart*, then pending in that court.

The invocation of these documents appears to have been made at the original hearing, and we cannot say that this was strictly regular. It would have been more in accordance with the rules of proceeding in prize if the cause had been first fully heard on the ship's documents and the preparatory proofs, and if invocation had been allowed, especially to the captors, only in case of the disclosure of suspicious circumstances on that hearing. But there was no such irregularity as was inconsistent with the lawful exercise of the discretion of the court, and none which would justify us in reversing the decree below because of the allowance of the invocation, or in refusing to look at the documents invoked and now part of the record. Especially should we not be justified in such refusal, after being made aware by the record that the steamship Gertrude was so manifestly good prize that no claim was ever interposed for her or her cargo, and after | having, at the last term, condemned the Stephen p. 21
Hart and her cargo by our own decree.

We have, therefore, looked into all the evidence, and will now dispose of the case.

We have already held in the case of the Bermuda, where goods, destined ultimately for a belligerent port, are being conveyed between two neutral ports by a neutral ship, under a charter made in good faith for that voyage, and without any fraudulent connection on the part of her owners with the ulterior destination of the goods, that the ship, though liable to seizure in order to the confiscation of the goods, is not liable to condemnation as prize.

We think that the Springbok fairly comes within this rule. Her papers were regular, and they all showed that the voyage on which she was captured was from London to Nassau, both neutral ports within the definitions of neutrality furnished by the international law. The papers, too, were all genuine, and there was no concealment of any of them and no spoliation. Her owners were neutrals, and do not appear to have had any interest in the cargo; and there is no sufficient proof that they had any knowledge of its alleged unlawful destination.

It is true that her shipping articles engaged the crew for the voyage, not only from London to Nassau, but also from thence, if required, to any other port of the West India Islands, American States, British North America, and other named countries, and finally to a port in the United Kingdom; and it is also true that this engagement would include,

should the master undertake it, a continuance of the voyage for the conveyance of the cargo from Nassau to a blockaded port; but there is no proof that there was any engagement for such continuance of the voyage. On the contrary, the charter-party, which has the face, at least, of an honest paper, stipulated for the delivery of the cargo at Nassau, where, so far as is shown by that document, the connection of the Springbok with it was to end.

The preparatory examinations do not contradict but rather sustain the papers. |

p. 22 The testimony of the master was that the vessel was destined to and for Nassau to deliver her cargo and return to the United Kingdom, and that her papers were entirely true and fair. And his testimony in this regard is corroborated by that of the other witnesses.

It is said, however, that the master, upon his examination, declared himself to have been ignorant of the real ownership of the cargo, and that this indicates unlawful intent. But it must be remembered that the master of the Springbok had a clear right to convey neutral goods of all descriptions, including contraband, from London to Nassau, subject to the belligerent right of seizure in order to confiscation of contraband, if found on board and proved to be in transit to the hostile belligerent. On the hypothesis, therefore, that the cargo was to be actually delivered at Nassau, without an ulterior destination known to and promoted by the master or owners, in bad faith, we cannot say that the master's ignorance of its ownership is an important circumstance in the case.

There is more weight in the argument for condemnation derived from the misrepresentation of the master concerning his knowledge of the cause of seizure. The master testified that he did not know when examined on what pretence the capture was made, while the mate and the steward deposed that they understood that the vessel was captured under the supposition that the cargo was contraband, and the boatswain testified that it was because the bills of lading did not show the contents of some of the cases.

The master must have known as much about the cause of capture as either of the witnesses; and his misrepresentation of the truth in this instance brings his statements concerning the real destination of the ship and the intention to deliver her cargo at Nassau into some discredit. Frankness and truth are especially required of the officers of captured vessels when examined in preparation for the first hearing in prize. And the clearest good faith may very reasonably be required of those engaged in alleged neutral commerce with a port constantly and

p. 23 notoriously used as a port of call and | transshipment by persons engaged in systematic violation of blockade and in the conveyance of contraband of war. That Nassau was such a port is not only known from evidence

before the prize courts, but from the official correspondence between the English and American governments, and the fact was distinctly stated by Earl Russell, then Foreign Secretary in the British ministry, in an answer, dated July 5th, 1862, to a communication from the shipowners of Liverpool.[1]

If, therefore, the case of the claimants of the ship depended wholly upon the testimony of the master, we should find it difficult to resist the argument for condemnation. But it does not depend wholly or mainly on that statement. The fairness of the papers, the apparent good faith of the stipulations of the charter-party in favor of the owners, and the testimony of the other witnesses, restrain us from harsh inferences against the owners of the vessel, who seem to be in no way compromised with the cargo, except through the misrepresentations of the master, and are not shown to have been connected with any former violation of neutral obligations.

In consideration of the master's misrepresentation, however, and of the circumstance that he signed bills of lading which did not state truly and fully the nature of the goods contained in the bales and cases mentioned in them, we shall, while directing restoration of the ship, allow no costs or damages to the claimants.

The case of the cargo is quite different from that of the ship.

The cargo was shipped at London in November and December, 1862, in part by Moses Brothers and the remainder by Speyer and Haywood.

The bills of lading, three in number, show no interest in any other person.

The charter-party was made by the master with one Begbie, and stipulated that the ship should take on board a cargo | of lawful p. 24
merchandise goods and deliver the same at Nassau to the charterers' agent at that port.

On completion of the lading on the 8th of December, Speyer and Haywood, subscribing themselves as agents for the charterers, addressed a note to the master directing him to proceed at once to Nassau, and on arrival report himself to B. W. Hart there, who would give him orders as to the delivery of the cargo and any further information he might require.

The bills of lading disclosed the contents of six hundred and nineteen, but concealed the contents of thirteen hundred and eighty-eight, of the two thousand and seven packages which made up the cargo. Like those in the Bermuda case they named no consignee, but required the cargo to be delivered to order or assigns. The manifest of the cargo also, like that in the Bermuda case, mentioned no consignee, but

[1] July 19th, 1862, Lawrence's Wheaton, 719.

described the cargo as deliverable to order. Unlike those bills and that manifest, however, these concealed the names of the real owners as well as the contents of more than two-thirds of the packages.

Why were the contents of the packages concealed? The owners knew that they were going to a port in the trade with which the utmost candor of statement might be reasonably required. The adventure was undertaken several months after the publication of the answer of Earl Russell to the Liverpool shipowners already mentioned. In that answer the British foreign secretary had spoken of the allegations by the American government that ships had been sent from England to America with fixed purpose to run the blockade, and that arms and ammunition had thus been conveyed to the Southern States to aid them in the war; and he had confessed his inability either to deny the allegations or to prosecute the offenders to conviction; and he had then distinctly informed the Liverpool memorialists that he could not be surprised that the cruisers of the United States should watch with vigilance a port which was said to be the great entrepôt of this commerce. For the concealment of the character of a cargo shipped for that entrepôt,
p. 25 after such a | warning, no honest reason can be assigned. The true reason must be found in the desire of the owners to hide from the scrutiny of the American cruisers the contraband character of a considerable portion of the contents of those packages.

And why were the names of those owners concealed? Can any honest reason be given for that? None has been suggested. But the real motive of concealment appears at once when we learn, from the claim, that Isaac, Campbell & Co., and Begbie were the owners of the cargo of the Springbok, and from the papers invoked, that Begbie was the owner of the steamship Gertrude, laden in Nassau in April, 1863, with a cargo corresponding in several respects with that now claimed by him and his associates, and despatched on a pretended voyage to St. John's, New Brunswick, but captured for unneutral conduct and abandoned to condemnation, without even the interposition of a claim in the prize court; and when we learn further from the same papers that Isaac, Campbell & Co. were the sole owners of the cargo of the Stephen Hart, consisting almost wholly of arms and munitions of war, and sent on a pretended destination to Cardenas, but with a real one for the States in rebellion. Clearly the true motive of this concealment must have been the apprehension of the claimants, that the disclosure of their names as owners would lead to the seizure of the ship in order to the condemnation of the cargo.

We are next to ascertain the real destination of the cargo, for these concealments do not, of themselves, warrant condemnation. If the real intention of the owners was that the cargo should be landed at

Nassau and incorporated by real sale into the common stock of the island, it must be restored, notwithstanding this misconduct.

What then was this real intention? That some other destination than Nassau was intended may be inferred, from the fact that the consignment, shown by the bills of lading and the manifest, was to order or assigns. Under the circumstances of this trade, already mentioned, such a consignment must be taken as a negation that any sale had been | made to p. 26
any one at Nassau. It must also be taken as a negation that any such sale was intended to be made there; for had such sale been intended, it is most likely that the goods would have been consigned for that purpose to some established house named in the bills of lading.

This inference is strengthened by the letter of Speyer & Haywood to the master, when about to sail from London. That letter directs him to report to B. W. Hart, the agent of the charterers at Nassau, and receive his instructions as to the delivery of the cargo. The property in it was to remain unchanged upon delivery. The agent was to receive it and execute the instructions of his principals.

What these instructions were may be collected, in part, from the character of the cargo.

A part of it, small in comparison with the whole, consisted of arms and munitions of war, contraband within the narrowest definition. Another and somewhat larger portion consisted of articles useful and necessary in war, and therefore contraband within the constructions of the American and English prize courts. These portions being contraband, the residue of the cargo, belonging to the same owners, must share their fate.[1]

But we do not now refer to the character of the cargo for the purpose of determining whether it was liable to condemnation as contraband, but for the purpose of ascertaining its real destination; for, we repeat, contraband or not, it could not be condemned, if really destined for Nassau and not beyond; and, contraband or not, it must be condemned if destined to any rebel port, for all rebel ports were under blockade.

Looking at the cargo with this view, we find that a part of it was specially fitted for use in the rebel military service, and a larger part, though not so specially fitted, was yet well adapted to such use. Under the first head we include the sixteen dozen swords, and the ten dozen rifle-bayonets, and | the forty-five thousand navy buttons, and the one p. 27
hundred and fifty thousand army buttons; and, under the latter, the seven bales of army cloth and the twenty bales of army blankets and other similar goods. We cannot look at such a cargo as this, and doubt that a considerable portion of it was going to the rebel States, where

[1] The Immanuel, 2 Robinson, 196; Carrington *v.* Merchants' Insurance Co., 8 Peters, 495.

alone it could be used ; nor can we doubt that the whole cargo had one destination.

Now if this cargo was not to be carried to its ultimate destination by the Springbok (and the proof does not warrant us in saying that it was), the plan must have been to send it forward by transshipment. And we think it evident that such was the purpose. We have already referred to the bills of lading, the manifest, and the letter of Speyer & Haywood, as indicating this intention ; and the same inference must be drawn from the disclosures by the invocation, that Isaac, Campbell & Co. had before supplied military goods to the rebel authorities by indirect shipments, and that Begbie was owner of the Gertrude and engaged in the business of running the blockade.

If these circumstances were insufficient grounds for a satisfactory conclusion, another might be found in the presence of the Gertrude in the harbor of Nassau with undenied intent to run the blockade, about the time when the arrival of the Springbok was expected there. It seems to us extremely probable that she had been sent to Nassau to await the arrival of the Springbok and to convey her cargo to a belligerent and blockaded port, and that she did not so convey it, only because the voyage was intercepted by the capture.

All these condemnatory circumstances must be taken in connection with the fraudulent concealment attempted in the bills of lading and the manifest, and with the very remarkable fact that not only has no application been made by the claimants for leave to take further proof in order to furnish some explanation of these circumstances, but that no claim, sworn to personally, by either of the claimants, has ever been filed.

p. 28 Upon the whole case we cannot doubt that the cargo was | originally shipped with intent to violate the blockade ; that the owners of the cargo intended that it should be transshipped at Nassau into some vessel more likely to succeed in reaching safely a blockaded port than the Springbok ; that the voyage from London to the blockaded port was, as to cargo, both in law and in the intent of the parties, one voyage ; and that the liability to condemnation, if captured during any part of that voyage, attached to the cargo from the time of sailing.

The decree of the District Court must, therefore, be reversed as to the ship, but without costs or damages to the claimants, and must be affirmed as to the cargo ; and the cause must be remanded for further proceedings

In conformity with this opinion.

The Peterhoff.

(5 Wallace, 28) 1866.

1. A blockade is not to be extended by construction.
2. The mouth of the Rio Grande was not included in the blockade of the ports of the rebel States, set on foot by the National government during the late rebellion; and neutral commerce with Matamoras, a neutral town on the Mexican side of the river, except in contraband destined to the enemy, was entirely free.
3. *Semble* that a belligerent cannot blockade the mouth of a river, occupied on one bank by neutrals with complete rights of navigation.
4. A vessel destined for a neutral port with no ulterior destination for the ship, or none by sea for the cargo to any blockaded place, violates no blockade.

   Hence trade, during our late rebellion, between London and Matamoras, two neutral places, the last an inland one of Mexico, and close to our Mexican boundary, even with intent to supply, from Matamoras, goods to Texas, then an enemy of the United States, was not unlawful on the ground of such violation.
5. The trade of neutrals with belligerents in articles not contraband is absolutely free unless interrupted by blockade: the conveyance by neutrals to belligerents of contraband articles is always unlawful, and such articles may always be seized during transit by sea.
6. The classification of goods as contraband or not contraband, which is best supported by American and English decisions, divides all merchandise into three classes.
   i. Articles manufactured, and primarily or ordinarily used for military purposes in time of war. p. 29
   ii. Articles which may be and are used for purposes of war or peace according to circumstances.
   iii. Articles exclusively used for peaceful purposes.
7. Merchandise of the first class destined to a belligerent country or places occupied by the army or navy of a belligerent is always contraband; merchandise of the second class is contraband only when actually destined to the military or naval use of a belligerent; while merchandise of the third class is not contraband at all, though liable to seizure and condemnation for violation of blockade or siege.
8. Parts of a cargo described in a ship's invoices as cases of 'artillery harness,' as 'men's army Bluchers,' as 'artillery boots,' and as 'government regulation gray blankets,' come within the first class.
9. Contraband articles contaminate the parts not contraband of a cargo if belonging to the same owner; and the non-contraband must share the fate of the contraband.
10. In modern times conveyance of contraband attaches in ordinary cases only to the freight of the contraband merchandise. It does not subject the vessel to forfeiture.
11. But, in determining the question of costs and expenses, the fact of such conveyance may be properly taken into consideration with other circumstances, such as want of frankness in a neutral captain engaged in a commerce open to great suspicion and his destruction of some kind of papers in the moment of capture,—and this although it seemed almost certain that the ship was destined to a port really neutral, and with a cargo for the most part neutral in character and destination.
12. The captain of a merchant steamer, when brought to by a vessel of war, is not privileged by the fact that he has a government mail on board, from sending,

if required, his papers on board the boarding vessel for examination; on the contrary, he is bound by that circumstance to the strictest performance of neutral duties and to special respect of belligerent rights.

13. Citizens of the United States faithful to the Union, who resided in the rebel States at any time during the civil war, but who during it escaped from those States, and have subsequently resided in the loyal States, or in neutral countries, lost no rights as citizens by reason of temporary and constrained residence in the rebellious portion of the country.

APPEAL from a decree of the District Court for the Southern District of New York, condemning for attempt to break blockade, a vessel ostensibly on a voyage from London to the mouth of the Rio Grande, with a cargo documented for a neutral port. |

p. 30 The case was thus:

The territory of the United States, as is generally known, is separated on one part of its boundary from the republic of Mexico by the *Rio Grande*, a large stream, entering by a broad mouth, and by a course at that point nearly east, the Gulf of Mexico. At the mouth of the river a bar prevents the passage of vessels drawing over seven feet of water. By treaty between the two nations the boundary line begins *in* the Gulf three leagues from land opposite the mouth of the river, and runs northward from the middle of it. The navigation of the stream is also made free and common to the citizens of both nations, without interruption by either without the consent of the other, even for the purpose of improving the navigation.

About forty miles up the river, *on the United States bank of the stream*, in the State of Texas, stands the American town of Brownsville; and nearly opposite, *on the Mexican bank*, the old Spanish one of Matamoras, separated but by the river. The natural facilities of intercourse between the two places are thus extremely easy. [See sketch *infra*, p. 1663.]

Both towns are approached from the Gulf by the Rio Grande; but Brownsville may be also approached through places more on the northern coast of the Gulf, and wholly within the Federal territory, to wit, by the *Brazos Santiago* and the *Boca Chica*.

In this state of geographical position and of treaty with Mexico, the President, on the 19th April, 1862, during the late rebellion in the Southern States, and with the purpose, as declared to foreign governments, to 'blockade the *whole* coast from the Chesapeake Bay *to* the Rio Grande,' declared the intention of the National government to set on foot a blockade of those States 'by posting a competent force *so as to prevent the entrance or the exit of vessels;*' and a naval force was soon after stationed near the mouth of the Rio Grande. No force of any kind was placed along the Texan bank of the river, that region being then in rebel possession, as the opposite was in Mexican.

p. 31 Nothing was said in these proclamations of the port of | Brownsville

being blockaded, though in a subsequent proclamation (February 18, 1864), relaxing the blockade, it was recited as a matter of fact that that place had been blockaded.

With this blockade above mentioned, as made by the proclamation of 19th April, in force, the Peterhoff, a British built and registered merchant screw-propeller, drawing sixteen feet of water, not a fast sailer, set sail from London upon a voyage documented by manifest, shipping list, clearance, and other papers, for the port of *Matamoras*.

The bills of lading, of which there were a large number, all stipulated for the delivery of the goods shipped ' off the Rio Grande, Gulf of Mexico, *for Matamoras ;* ' adding, that they were to be taken from alongside the ship, providing lighters can cross the bar.

With the exception of a portion consigned to the orders of the captain, which was owned by the owners of the vessel, the cargo was represented in agency or consigneeship chiefly by three different persons on board the vessel as passengers—Redgate, Bowden, and Almond—all natives of Great Britain. Redgate stated that a large portion was consigned to him as a ' merchant residing in Matamoras,' and that, ' had the goods arrived there, they were to take the chances of the market.' Bowden testified to the same effect, that, had they arrived, the portion represented by him would have taken the chances of sale in the market, and the proceeds been returned to the shippers. Almond, that it was his intention to settle in Matamoras, and to sell the goods represented by himself, ' taking my chance in the market for the sale.'

At the time of this voyage Mexico was at war with France ; that is to say, France was endeavoring to place Prince Maximilian on the throne of Mexico, against the wishes of its people and of its legitimate President, Juarez, and was supporting its pretensions by force of arms in the *Mexican* territory.

The cargo of the Peterhoff, valued at $650,000, was a miscellaneous cargo, and was shipped by different shippers, all | British subjects except p. 32
one, Redgate, hereafter described. *A part of it was owned by the owner of the vessel.*

Of its numerous packages, a certain number contained articles useful for military and naval purposes in time of war. Among them, as specially to be noted, were thirty-six cases of artillery harness in sets for four horses, with two riding-saddles attached to each set. *The owner of this artillery harness owned also a portion of the non-military part of the cargo.* There were 14,450 pairs of ' Blucher ' or army boots ; also ' artillery boots ; ' 5580 pairs of ' government regulation gray blankets ; ' 95 casks of horseshoes of a large size, suitable for cavalry service ; and 52,000 horseshoe nails.

There were also considerable amounts of iron, steel, shovels, spades,

blacksmiths' bellows and anvils, nails, leather; and also an assorted lot of drugs; 1000 pounds of calomel, large amounts of morphine, 265 pounds of chloroform, and 2640 ounces of quinine. There were also large varieties of ordinary goods.

Owing to the blockade of the whole Southern coast, drugs, and especially quinine, were greatly needed in the Southern States.

During the rebellion, Matamoras, previously an unimportant place, became suddenly a port of immense trade; a vast portion of this new trade having been, as was matter of common assertion and belief, carried on through Brownsville, between merchants of neutral nations and the Southern States. And it was stated at the bar that the Federal government had, for reasons of public policy, even granted several clearances from New York to Matamoras during the rebellion, though only on security being given that no supplies should be furnished to persons in rebellion.

The Peterhoff never reached the Rio Grande. She was captured by the United States vessel of war Vanderbilt on suspicion of intent to run the blockade and of having contraband on board. When captured she was in the Caribbean Sea south of Cuba, and in a course to the Rio Grande, through the Gulf of Mexico; having some days previously been |
p. 33 boarded, but not captured, by another Federal cruiser, the Alabama.

She had on board when captured a British mail for Matamoras, closed under official seal. The officer of the Vanderbilt, on boarding her, asked her captain to take to that vessel his papers. This the captain of the Peterhoff refused to do, assigning as the ground of refusal that he was in charge of her Majesty's mail, and requiring that all papers should be examined on the Peterhoff itself.

In addition it appeared that papers or articles of some kind had been destroyed in view of capture. A 'package' was thrown overboard. The captain of the Peterhoff, having in a general way presented a similar statement on the examination *in preparatorio*, gave, on a supplemental examination, this circumstantial account of the matter:

'Before leaving Falmouth I received a telegram from the owner of the ship, instructing me to question the passengers as to whether they had any documents in their possession. I immediately called them together. They, one and all, including a passenger named Mohl, declared that they had nothing in their possession of such description. After the ship left Falmouth, Mr. Mohl came to me, and stated that he had a small packet of white powder—'patent white powder' he called it—in which he and some of his friends were interested. I said, 'You had better deliver it up to me, for it is a dangerous article to have on board.'' He gave it to me and I locked it up in my state-room. I asked him why he had not mentioned this before leaving Falmouth. He replied, that as it was neither papers or writings of any kind, he did not think it requisite. When the Alabama approached us I called Mr. Mohl and told him that I did not like having this packet of powder on board, and that

if the ship was likely to be searched it must either be opened or destroyed, and then gave it in charge of one of my officers, the second officer, with orders to throw the package overboard if I instructed him. Our vessel not being examined by the Alabama, it was not then destroyed. After we were boarded by the Vanderbilt I called Mr. Mohl again and requested him to let me see the contents of the package. To this he objected, saying it was a *patent*, and could not be seen by any but himself and friends. So | I ordered it to be thrown overboard, fearing it might p. 34 jeopardize the ship in some way, and it was accordingly thrown overboard. I believe it to have been white powder as stated by Mr. Mohl, and had no reason to believe otherwise, and do not think any one knew the contents of this packet but this same Mr. Mohl.'

One of the seamen, however, testified that the package thrown overboard was a box into which the captain put papers, and that giving it to the second officer he told him to put something in the box to sink it, and on raising of his finger to let it go overboard.

Another seaman, that the package was 'a sealed parcel wrapped in brown paper.'

A third, that it was a package sewed up in canvas weighted with lead so as to sink it, and was spoken of by the captain as 'despatches;' 'that after sending for Mr. Mohl to witness the necessity for throwing the package overboard, he then ordered the second officer to throw it over from a part of the ship where it would not be observed by the Vanderbilt; which he did; and that Mr. Mohl appeared very much depressed at the necessity.'

Mohl was permitted by the government after the capture to go at large.

The captain admitted that he had torn up some letters, which he swore were letters from his wife and father; swearing also that no other papers were destroyed.

A small portion of the cargo, about £150, was owned by, and a large part, about £20,000, was consigned to a person named Redgate, already referred to. In the part consigned he was interested by way of commission. Redgate was a native of England, but had come to Texas while it was a Mexican province, and was a resident there when it was annexed to the United States. He made this statement, not disproved, of his conduct during the rebellion.

'Since the annexation of Texas to the United States, the deponent has borne true allegiance to the United States in every matter and thing. In every way and shape possible for him to act, he opposed the secession of the State of Texas from the | Union. At the time of the p. 35 passage of the so-called secession ordinance of that State, he was a member of its legislature. After the passage, he, together with fourteen members of the house of representatives, four senators, and six protesting delegates of the secession convention, signed an address to the people of Texas, urging them to resist the ordinance and to remain in the Union. That

address was printed and circulated, as far as possible, throughout the State. He contributed to the circulation of the said address a very considerable amount of money. [Address produced.] Owing to the state of public feeling in Texas at the time of the publication and circulation of the address, the lives of the signers of the same were greatly perilled; one of them has since been murdered, and another is now in duress, as the deponent is informed and believes; and the remainder of the said twenty-four senators, members, and protesting delegates (amongst the latter this deponent), are all, or nearly all, in exile from the State of Texas as political refugees. After the promulgation of the said address, and before leaving the State of Texas, as he has reason to believe, he narrowly escaped assassination, and he knows that his life was conspired against by the secessionists in consequence of his political opinions and of his opposition to secession.'

After leaving Texas, Redgate became a resident of Matamoras, trading there and thence. He was on board the vessel when captured, superintending his interest.

The vessel having been taken into New York, was there libelled in the District Court as prize of war. Claim was filed by the captain, intervening for the interest of his principals the 'owners of the steamer and cargo;' also by Redgate as 'owner, agent, and consignee of a large portion of the cargo,' and by Almond as 'owner, agent, and consignee' of another portion.

The District Court condemned the vessel and cargo as lawful prize of war.

The case was now before this court, on the appeal of Jarman, professing to represent the vessel and cargo, and on the appeals of Redgate and Almond, professing to represent their respective portions of the cargo. |

p. 36 *Mr. Coffey, special counsel, and Mr. Ashton, Assistant A. G., for the United States, and in support of the decree:*

I. The fact that if the vessel went to the Rio Grande at all, all her cargo would have to be taken off in lighters, and if taken to Matamoras, would have to be transported on these for no less a distance than forty miles, raises some presumption that the cargo was not destined to go up or even to the Rio Grande at all; but that the ostensible destination was a simulated one, and that really, the blockade was meant to be broken at any point of the Southern coast which should be found most practicable; or, at farthest, broken on the Gulf *coast* of Texas, which, it will be conceded, that our blockade covered.

The idea is confirmed by the various facts, as that

1. The cargo was of a character and extent, wholly unadapted to the insignificant port of Matamoras and the Mexican market which centres there, but perfectly adapted in all respects to the enemy market, everywhere, and by *that* market urgently demanded.

2. That the master refused to convey his papers aboard the Vanderbilt, and most of all,

3. That, under circumstances of aggravation, he destroyed papers in the moment of capture.

We advert to these last two points hereafter.

II. Admitting, however, that the cargo was destined to go up the Rio Grande and to Matamoras specifically as documented, and was meant *bonâ fide* for its use, the destination was unlawful.

1. That a blockade of the *mouth* of the Rio Grande was in fact included in our blockade of the Southern coast, cannot, we think, be rightly denied. The purpose of the government, both unquestionable and clearly expressed, was to blockade the rebellious States, in a specific manner. And how? 'By posting a competent force *so* as to *prevent* the *entrance* or *exit* of vessels' into or out of those regions: '*so*,' of course, as to prevent such entrance or exit in any form; including, of necessity, perhaps primarily, that form in which vessels usually, in common parlance, *do*, or, in strict parlance, | *can* alone p. 37
enter a country; that is to say, by sailing into it by its navigable rivers.

A blockade of the mere *Gulf coast* of Texas was no blockade. That coast has few or no ports. The vast stream of the Rio Grande, was the best place of entrance into Texas, and if the blockade was to be a blockade made 'so' as to prevent entrance of vessels into that State, then Matamoras, Brownsville, and the whole banks of the river, as far as navigable for vessels, was blockaded of irresistible inference. And that this was the way in which the blockade was understood by its author to have been made, is shown by the proclamation relaxing it. This recites that Brownsville had been blockaded; which implied that the whole mouth of the Rio Grande, like the whole mouth of other rivers on the rebel coast, had been: a blockade of half a river being of no value to the blockading government, and not to be presumed.

We assume then that the river mouth was intended by our government to be blockaded.

Had our government a right so to blockade it?

It had.

This proposition rests on the principle that the belligerent has a right to make his blockade absolutely effective.

To allow vessels or their cargoes to cross the bar at the mouth of the Rio Grande and pass up the river under the pretext of going to Matamoras, was to render the blockade of the Texan side of the river nugatory. No watchfulness or energy in the blockading squadron outside the bar could prevent unlimited supplies from reaching Brownsville, and through it the whole confederacy, if they might with impunity be carried up to Matamoras, only a few yards distant from Brownsville, and far beyond the reach of the blockaders.

The Maria,[1] decided by Sir William Scott, asserts the principle which we put forth. There the river *Weser*, one bank of which was held by the
p. 38 French (enemy), and on the | other bank of which was the neutral city of Bremen, was blockaded by the British. The cargo was shipped from Bremen on the Weser to the Jahde in lighters, and there transshipped, and was on its way to America in the vessel when captured. It was contended by the captors that the exportation from Bremen was a violation of the blockade of the Weser. Sir William Scott said :

'I have had frequent occasion to observe how severely the neutral cities connected with the Weser and the Elbe are pressed upon by the blockade of those rivers. At the same time it is my duty to apply to those operations of blockade the principles that belong to that branch of the law of nations generally, and by which only such measures can be maintained. The principles themselves cannot differ ; although it will undoubtedly be the disposition of the court to alleviate the situation of those towns as much as possible by attending to any distinctions that can be advanced in their favor, not inconsistent with the sound construction of the general principles of law. A blockade imposed on the Weser must in its nature be held to affect the commerce of Bremen ; because if the commerce of all the towns situated on that river is allowed, it would be only to say, in more indirect language, that the blockade itself did not exist. It cannot be doubted, then, on general principles, that these goods would be subject to condemnation, as having been conveyed through the Weser ; and whether that was effected in large vessels or small would be perfectly insignificant. That they were brought through the mouth of the blockaded river for the purpose of being shipped for exportation would subject them to be considered as taken on a continued voyage, and as liable to all the same principles that are applied to a direct voyage, of which the *terminus a quo* and the *terminus ad quem* are precisely the same as those of the more circuitous destination. . . . If, therefore, nothing had passed between the government of this country and the city of Bremen, it appears to me that these goods would be subject to condemnation, and that I should be unable to distinguish the port of Bremen from any other place liable to the general operations of a blockade.'

p. 39 *The Zelden Rust*,[2] by the same judge, seems to be to the | like effect. There a cargo of Dutch cheese was taken on an asserted destination from Amsterdam to Corunna. The captors argued that a destination to Corunna was, in fact, a destination to Ferrol (the enemy port), since those ports were both in the same bay, and so situated as to render it impossible to prevent supplies from going immediately to Ferrol for the use of the Spanish navy if they were permitted to enter the bay unmolested on an asserted destination to Corunna. Having held that cheese, going to a place of naval equipment and fit for naval use, was contraband, Sir William Scott said :

'Corunna is, I believe, itself a place of naval equipment in some

[1] 6 Robinson, 201, 204.

[2] 6 Robinson, 93.

degree ; and if not so exclusively, and in its prominent character, yet from its vicinity to Ferrol it is almost identified with that port. These ports are situated in the same bay, and if the supply is permitted to be imported into the bay, it would, I conceive, be impossible to prevent it from going on immediately, and in the same conveyance, to Ferrol.'

He adds :

'I think myself warranted to consider this cargo, *on the present destination, as contraband, and, as such, subject to condemnation.*'[1]

His language in *The Neutralitet*,—not indeed that of a solemn judgment, but, as *his*, still much to be listened to,—is equally in support of our position :

'I am disposed to agree to a position advanced in argument, that a belligerent is not called upon to admit that neutral ships can innocently place themselves in a situation where they may with impunity break the blockade whenever they please. If the belligerent country has a right to impose a blockade, it must be justified in the necessary means of enforcing that right ; and if a vessel could, under the pretence of going further, approach, *cy pres*, close up to the blockaded port, so as to be enabled | to slip in without obstruction, it would be impossible p. 40 that any blockade could be maintained. It would, I think, be no unfair rule of evidence to hold as a presumption *de jure*, that she goes there with an intention of breaking the blockade ; and if such an inference may possibly operate with severity in particular cases, where the parties are innocent in their intentions, it is a severity necessarily connected with the rules of evidence, and essential to the effectual exercise of the right of war.'

Other cases—as *The Charlotte Sophia*, *The Charlotte Christine*, and *The Gute Erwartung*,[2] decided, all, by Sir William Scott, all tend to a similar conclusion.

We do not assert that *all* neutral commerce with Matamoras was interdicted by the blockade of the Rio Grande, but simply commerce *of a contraband character*. The principle declared by Lord Stowell was applied by him to all neutral trade of Bremen, and, in reason, may safely extend that far. But we have preferred to restrict its application to trade of a contraband character, because the case of the Peterhoff requires no more, and because, so stated, it seems to us to be within the authority of *The Zelden Rust*.

2. If our position just presented is not a true one, still as a matter of fact the ulterior destination of the cargo was Texas, and the other Southern States then in insurrection, and this ulterior destination was a breach of the blockade.

The whole case proves the destination which we allege.

We must advert here to the late familiar history of the straits to which the Southern armies and people were reduced by our stringent

[1] 6 Robinson, 94.

[2] 6 Robinson, 205, 101, and 182.

blockade of their whole coast. The sudden elevation of the petty port of Matamoras into a great centre of commercial activity rivalling the trade of New York or Liverpool, because its territorial neutrality, and its proximity to Texas, seemed to secure to trade with the rebels almost absolute immunity from danger, and to set at complete defiance the efforts of our blockaders; the remarkable spectacle of first-class ships, laden
p. 41 with cargoes of variety | and value, arrested off an almost uninhabited coast by a bar which compelled them to transfer their cargoes to lighters in the open sea, many miles from their pretended port of destination, and which even prevented their approaching that port after they were unladen; the sudden accession to the population of Matamoras of large numbers of eager speculators, most of whom were, like Redgate, inhabitants of rebel States, and the establishment of numerous and extensive importing houses with branches at London, Liverpool, and Glasgow, who achieved both 'entrance' and 'exits' of vessels: all this is matter of present judicial knowledge.

Under the stimulus of fancied exemption from danger, this new rebel trade 'rose like an exhalation,' and Matamoras became the commercial outpost of the rebellion. For the new trade was not with the country in which Matamoras is situated, nor even with that town itself, but with the territory on the other side of the river, only a stone's throw across. The market, which was called Matamoras, was the whole population of our Southern States, extending to the Potomac, and the Southern armies on both sides of the Mississippi. And the supplies thus got from Matamoras were paid for in *cotton*.

Was this sort of commerce a breach of our blockade?

Practically, without any doubt whatever, it was.

And it was so in law. *The Bermuda* is in point. There the voyage, as documented, was to the neutral port, Nassau. There was no reason to suppose that the vessel itself, the Bermuda, meant to run our blockade. The cargo was, perhaps, meant to be landed at the neutral port. But it was unsuited for that port. 'The character of the cargo,' said Chase, C. J., who gave the opinion of the court, 'made its *ulterior*, if not direct destination, to a rebel port, quite certain.' Counsel argued much in favor of what were set up as neutral rights. But the court, defining with clearness and precision, all rights that were really neutral, said that 'if it was intended to affirm that a neutral ship may take on a contraband
p. 42 cargo *ostensibly* for a neutral port, but destined | *in reality* for a belligerent port, either by the same ship *or by another*, without becoming liable, from the commencement to the end of the voyage, to seizure, in order to the confiscation of the cargo, we do not agree to it.'

And acting on this view, a decree of condemnation was affirmed.

The decree below ought, therefore, to be 'affirmed;' affirmed *in toto*,

and in form ; but if it is not so affirmed, it should be affirmed in its main parts severally : and this in the result is nearly tantamount to an affirmance simply.

(*a*) *As to the contraband, and also as to the whole part owned by the owner of that contraband portion.* Both are confiscable. A large part of the cargo was contraband of war by any definition of contraband of war ever made. It cannot be doubted that *this* part was meant for the Southern army. If this was so, then even if really shipped for Matamoras and meant to be landed and sold to the enemy there, it is confiscable, and it contaminates all owned by the owner of it.

(*b*) *As to the part claimed by Redgate.* This is confiscable as enemy's property. Redgate was a citizen of Texas, an enemy's country ; and irrespective of any personal dispositions in law, an enemy. This is the doctrine as settled by the court, even under circumstances of the greatest hardship.[1] Now restitution cannot be made to an enemy. He has no standing in court. The decree as to that part of the cargo claimed by him, must stand.[2]

Nor can the court go behind the claim of Redgate to seek neutral owners whom he may represent, and who are not disclosed either by him or by themselves. They have no legal existence except in him, and we may safely infer that they have no existence at all.

Besides, the legal effect of the consignment of these goods to Redgate, into whose actual possession they were delivered | at the time of shipment, p. 43
was to vest the title in him, and so make them lawful prize, no matter by whom they were shipped.[3]

(*c*) *The vessel.* This must also be condemned.

1. The refusal of the master when boarded by the Vanderbilt, to exhibit his papers on board that vessel, was a grave offence against public law. The case is like that of *The Maria,* condemned for refusal by Sir William Scott.[4]

2. But the crowning and conclusive act was the destruction of papers in the moment of capture ; and the various falsehoods,—afterthoughts, in a good degree,—in concealment of the fact of destruction, or of the character and importance of the papers. As evidence of intent to run the blockade, this, indeed, should condemn both vessel and cargo. But as a rule of policy it equally holds as respects a vessel, where all the cargo may not be involved. The case comes within *The Pizarro,*[5] where it is said by this court that if the explanation be not prompt and frank, or if it be weak and futile, condemnation ensues from defects in the evidence ;

[1] Mrs. Alexander's Cotton, 2 Wallace, 404.
[2] Halleck's International Law, chap. 31, § 23, p. 772 ; 3 Philimore on same, § 461 ; The Falcon, 6 Robinson, 199.
[3] The Packet de Bilboa, 2 Robinson, 133.
[4] 1 Robinson, 340, 360.
[5] 2 Wheaton, 227.

defects which the party is not permitted to supply. It falls still more within the case of *The Two Brothers*, where Sir William Scott says, that 'if neutral masters destroyed papers, they were not at liberty *to explain away such suppression by saying they were only private letters*; that it was *always* to be supposed that such letters relate to the ship or cargo, and that it was of material consequence to some interests that they should be destroyed.'[1]

It is a presumption of law that with such an immense body of contraband on board the destination, direct or through Matamoras, of *it*, was known to the owners of the vessel. This is the law to be gathered from numerous cases: as, for example, from among them, *The Neutralitet*,[2]
p. 44 where the owner chartered the ship for contraband trade; *The* | *Franklin*,[3] where the ship was carrying contraband, with a false destination, and where Sir William Scott said that the relaxation of the ancient rule which condemned the ship with the cargo could only be claimed by *fair* cases; *The Ranger*,[4] where he said, 'If the owner of the ship will place his property under the absolute management and control of persons who are *capable* of lending it to be made an instrument of fraud in the hands of the enemy, he must sustain the consequences of such misconduct on the part of his agent;' *The Baltic*,[5] where the ship was condemned because 'the owner must have been aware of the fraud intended, if not a confidential party to it.'[6]

Messrs. Marvin, Sherwood, and A. F. Smith, contra, for the claimants:

I. There is really no ground to suppose intent to do anything but what was ostensibly presented as the purpose of the voyage. The vessel was a slow sailer, not at all suited by speed for a blockade-runner. The cargo was needed by Mexico for her war with France as much as by the rebel army for its resistance to the Federal power. The vessel, drawing as much water as she did, had necessarily to anchor off the mouth of the Rio Grande. She could not go into it. We speak of the master's disinclination to take his papers aboard the Vanderbilt and of his alleged throwing overboard of papers hereafter. The destination then was not simulated, and the cargo was destined to go up the Rio Grande.

II. This destination was lawful—

1. Because in point of fact the mouth of the Rio Grande was not meant to be blockaded. We at times had cruisers at its mouth, but they
p. 45 did not assert a right to blockade a | river which was one-half Mexican.

[1] 1 Robinson, 131; see also The Rosalie and Betty, 2 Id. 343–353; The Rising Sun, Id. 104.

[2] 3 Robinson, 296. [3] 3 Robinson, 217. [4] Id. 126. [5] 1 Acton, 25.

[6] And see the Jonge Margaretha, 1 Robinson, 189; The Mercurius, Id. 288 and note; The Jonge Tobias, Id. 329; The Neptunus, 3 Id. 108; The Eenrom, 2 Id. 1; The Edward, 4 Id. 68; The Oster Risoer, Id. 200; The Carolina, Id. 260; The Richmond, 5 Id. 325; The Charlotte, Id. 275; The Ringende Jacob, 1 Id. 89; Carrington *v.* The Merchants' Insurance Co., 8 Peters, 520.

As hereafter stated, vessels almost daily cleared from Northern ports, with the acquiescence of the government, for the port of Matamoras.

2. Because, if it had been blockaded, the blockade would have been void ; our government having no right to prevent trade by neutrals with Mexico ; not even with those ports separated from us by a boundary river. None of the cases cited are *adjudications* of the point. *The Zelden Rust* is not so, for both the ports there of Corunna and Ferrol were enemy's ports, and the question was whether the cargo was contraband.'[1]

Upon principle, we insist that the courts of the United States will not add new restrictions to neutral trade.

It is argued that the real destination of the cargo was Texas, through Matamoras. This is not clear ; the cargo having been suited for Mexico while at war with France as much as for our Southwestern States, then in insurrection against the National government. But if the destination were as alleged, it would be after a sale at Matamoras and an incorporation into the stock of commerce. The law laid down in *The Bermuda* would protect, not condemn, this. But the voyage of that ship was so different from that of the Peterhoff that the decision in *The Bermuda* does not apply.

Whatever might be the law on the case as existing elsewhere or under other circumstances, is not our government estopped from capture and condemnation here ? As a matter of fact it may be stated that between the 1st November, 1862, and the date of this capture, fifty-nine vessels with cargoes have cleared from the port of New York alone to the port of Matamoras [the dates were given], under the sanction of the Treasury Department and the custom-house officers. This commerce was permitted to go on certainly from the city of New York, and we suppose from other seaports of note in the Northern States. Our own country and other countries have participated in it without hindrance alike ; and having done so in a manner that gave notice to | the world that this course of p. 46
commerce was free, how can our government set up the right of capture ? In truth the government has been placed in an awkward position by the act of the naval forces now under consideration, and its law officers will add to the awkwardness of its position by endeavoring to justify the captors ; a thing impossible, we think, when the controlling circumstances of the case are considered.

The state of commercial things just alluded to was brought to the attention of the President and War Department during the war, by the Union refugees of Texas and others, and the necessity of taking military possession of the left bank of the Rio Grande, with a view of cutting off this trade, urged upon the government. But for reasons of public policy the trade was not cut off. The government desired, perhaps, to alleviate the ' cotton famine ' in England and France, and so to take away from

[1] See the Frau Margaretha, 6 Robinson, 92 ; The Jonge Pieter, 4 Id. 79.

those countries one excuse for their threatened 'intervention' in behalf of our Southern States. Whatever was the reason, it was a satisfactory one to our government at the time.

Finally, giving up the correctness of a condemnation *in toto*, it is argued that the vessel and parts of the cargo should be condemned.

(*a*) An argument is made that some part of the cargo was contraband.

The mere fact that contraband of war imported into Mexico for *trade there* might be again sold, and so come to the use of the belligerent, would have no effect upon the question at issue. It is trade *with the belligerent* in contraband that subjects to capture. Trade between neutrals in contraband of war is legitimate, although they both know or believe that, eventually, the contraband may be sold to the belligerent. This was admitted even in *The Bermuda*.[1]

p. 47 Of course it is not pretended that the concealment of the | real destination by the interposition of a simulated one would protect the trade, where the real destination was the belligerent port or the enemy's army.

But how much contraband was there? for the contraband must be in considerable quantities to make an offence.[2] The 'Blucher boots' are formidable features at first view. But every one acquainted with the habits of the people of Mexico, and especially of those much in the saddle, is aware of the extensive use of what are here thus called. In travelling over a country where there are neither ferries nor bridges, every man's horse is his means of transit, and in fording and swimming streams this sort of boots is used as a protection to the limbs and feet. So as to the supposed *military* blankets. In a country where nearly the whole travelling is done on horseback, a horse and saddle, a lariat at the saddle-bow, and a pair of blankets behind, are the traveller's equipment. These blankets are his shelter from the storm, and whether in the cabin or on the prairie, with his saddle for a pillow, they make his bed for the night.

But what is contraband by the law of nations as recognized and insisted by the government of the United States? This appears by reference to the various treaties and state papers.[3]

In view of the law of nations as settled by the authorities cited in the note, there was nothing contraband on board but the artillery harness.

[1] See also The Commercen, 1 Wheaton, 382, 388–9; The Ocean, 3 Robinson, 297; The Jonge Pieter, 4 Id. 79; Treaty with Great Britain, 1794, Art. 18, 8 Stat. at Large, 125.

[2] Wheaton's International Law, 565; The Atalanta, 6 Robinson, 440, 455; Hazlett's Manual, &c., 222.

[3] Treaty with Great Britain of 1794, Art. 18, 8 Stat. at Large, 125; see, also, Mr. Pickering, Secretary of State, to Mr. Pinckney, at Paris, June 12th, 1797, 2 Elliot's Diplomatic Code, 524–5. Mr. Pickering, Secretary of State, to Mr. Monroe, Minister at Paris, September 12th, 1795, 1 American State Papers, 596–7. Mr. Pickering to Messrs. Pinckney, Marshall, and Gerry, Ministers to French Republic, July 15th, 1797, 2 Id. 153–4. Messrs. Pinckney, Marshall and Gerry to the French Ministers 27th January, 1798, Id. 169, 174, 175.

If it were proved that any contraband on board was designed directly for the rebels, that would not subject to condemnation either the ship or the rest of the cargo.[1] |

Trade in contraband, even with the enemy, is legitimate; it only p. 48
subjects the contraband to condemnation and the ship to loss of freight.[2]

(*b*) *Redgate's former residence in Texas.* This cannot subject his portion of the cargo to condemnation even under the too hard rule set up. He no longer resided in Texas, and the case is not within the rule, nor the reason of the rule stated in the case cited.

(*c*) *As to the vessel.*

1. The refusal of Captain Jarman, if he did refuse, to go on board the Vanderbilt, giving as a reason that he was 'in charge of her Majesty's mails,' and offering also the papers and ship for search, was no resistance of the 'right of search' to subject the ship or cargo to condemnation.

The Maria, relied upon by the other side, is no authority for so tyrannical a right; that was a case of absolute resistance to search.

2. *Spoliation of papers* is in itself no ground for condemnation.[3] It is only evidence, more or less convincing according to the circumstances of the case and the character of the papers destroyed, of the existence of some other ground for condemnation, such as a purpose to break blockade, or the carrying of contraband, to the enemy. In the present case, apparently, no papers were destroyed, nothing was thrown over but a packet believed by the master to contain powder brought on board by a passenger without the master's knowledge or consent. The passenger had no interest in the ship or cargo, and he was permitted by the captors, without the consent of the claimants, to depart and go where he pleased, without being examined as a witness. Had he been examined he would in all probability have proved it to have contained white powder as he alleged it to contain. The throwing overboard of the packet was an unwise act. That is all.

And there is no evidence that the owners of the ship | came within the p. 49
cases cited of parties 'who lent themselves as an instrument of fraud in the hands of the enemy.'

The CHIEF JUSTICE delivered the opinion of the court.

This case is of much interest. It was very thoroughly argued, and has been attentively considered.

The Peterhoff was captured near the island of St. Thomas, in the West Indies, on the 25th of February, 1863, by the United States Steamship Vanderbilt. She was fully documented as a British merchant steamer, bound from London to Matamoras, in Mexico, but was seized,

[1] Wheaton's International Law, 567–8; 1 Kent's Com. 142, 143 (margin).
[2] The Santissima Trinidad, 7 Wheaton, 283.
[3] The Pizarro, 2 Wheaton, 227.

without question of her neutral nationality, upon suspicion that her real destination was to the blockaded coast of the States in rebellion, and that her cargo consisted, in part, of contraband goods.

The evidence in the record satisfies us that the voyage of the Peterhoff was not simulated. She was in the proper course of a voyage from London to Matamoras. Her manifest, shipping list, clearance, and other custom-house papers, all show an intended voyage from the one port to the other. And the preparatory testimony fully corrobates the documentary evidence.

Nor have we been able to find anything in the record which fairly warrants a belief that the cargo had any other direct destination. All the bills of lading show shipments to be delivered off the mouth of the Rio Grande, into lighters, for Matamoras. And this was in the usual course of trade. Matamoras lies on the Rio Grande forty miles above its mouth; and the Peterhoff's draught of water would not allow her to enter the river. She could complete her voyage, therefore, in no other way than by the delivery of her cargo into lighters for conveyance to the port of destination. It is true that, by these lighters, some of the cargo might be conveyed directly to the blockaded coast; but there is no evidence which warrants us in saying that such conveyance was intended by the master or the shippers.

We dismiss, therefore, from consideration, the claim, suggested rather
p. 50 than urged in behalf of the government, that | the ship and cargo, both or either, were destined for the blockaded coast.

But it was maintained in argument (1) that trade with Matamoras, at the time of the capture, was made unlawful by the blockade of the mouth of the Rio Grande; and if not, then (2) that the ulterior destination of the cargo was Texas and the other States in rebellion, and that this ulterior destination was in breach of the blockade.

We agree that, so far as liability for infringement of blockade is concerned, ship and cargo must share the same fate. The owners of the former were owners also of part of the latter; the adventure was common; the destination of the cargo, ulterior as well as direct, was known to the owners of the ship, and the voyage was undertaken to promote the objects of the shippers. There is nothing in this case as in that of the Springbok to distinguish between the liability of the ship and that of the merchandise it conveyed.

We proceed to inquire, therefore, whether the mouth of the Rio Grande was, in fact, included in the blockade of the rebel coast?

It must be premised that no paper or constructive blockade is allowed by international law. When such blockades have been attempted by other nations, the United States have ever protested against them and denied their validity. Their illegality is now confessed on all hands.

It was solemnly proclaimed in the Declaration of Paris of 1856, to which most of the civilized nations of the world have since adhered; and this principle is nowhere more fully recognized than in our own country, though not a party to that declaration.

What then was the blockade of the rebel States? The President's proclamation of the 19th April, 1862, declared the intention of the government 'to set on foot a blockade of the ports' of those States, 'by posting a competent force so as to prevent the entrance or exit of vessels.'[1] And, in explanation of this proclamation, foreign governments were | informed 'that it was intended to blockade the whole coast from p. 51
the Chesapeake Bay to the Rio Grande.'[2]

In determining the question whether this blockade was intended to include the mouth of the Rio Grande, the treaty with Mexico,[3] in relation to that river, must be considered. It was stipulated in the 5th article that the boundary line between the United States and Mexico should commence in the Gulf, three leagues from land opposite the mouth of the Rio Grande, and run northward with the middle of the river. And in the 7th article it was further stipulated that the navigation of the river should be free and common to the citizens of both countries without interruption by either without the consent of the other, even for the purpose of improving the navigation.

The mouth of the Rio Grande was, therefore, for half its width, within Mexican territory, and, for the purposes of navigation, was, altogether, as much Mexican as American. It is clear, therefore, that nothing short of an express declaration by the Executive would warrant us in ascribing to the government an intention to blockade such a river in time of peace between the two Republics.

It is supposed that such a declaration is contained in the President's proclamation of February 18th, 1864,[4] which recites as matter of fact that the port of Brownsville had been blockaded, and declares the relaxation of the blockade. The argument is that Brownsville is situated on the Texan bank of the Rio Grande, opposite Matamoras; and that the recital in the proclamation that Brownsville had been blockaded must therefore be regarded as equivalent to an assertion that the mouth of the river was included in the blockade of the coast. It would be difficult to avoid this inference if Brownsville could only be blockaded by the blockade of the river. But that town may be blockaded also by the blockade of the harbor of Brazos Santiago and the Boca Chica, which were, without question, included in the blockade | of the coast. Indeed, until within p. 52
a year prior to the proclamation, the port of entry for the district was not Brownsville, but Point Isabel on that harbor; and, in the usual course,

[1] 12 Stat. at Large, 1259.
[2] Lawrence's Wheaton, 829, *n.*
[3] 9 Stat. at Large, 926.
[4] 13 Stat. at Large, 740.

merchandise intended for Brownsville was entered at Point Isabel, and taken by a short land conveyance to its destination.

We know of no judicial precedent for extending a blockade by construction. But there are precedents of great authority the other way. We will cite one.

The Frau Ilsabe [1] and her cargo were captured in 1799 for breach of the British blockade of Holland. The voyage was from Hamburg to Antwerp, and, of course, in its latter part, up the Scheldt. Condemnation of the cargo was asked on the ground that the Scheldt was blockaded by the blockade of Holland. But Sir W. Scott said, ' Antwerp is certainly no part of Holland ; and, with respect to the Scheldt, it is not within the Dutch territory, but rather a conterminous river, dividing Holland from the adjacent country.' This case is the more remarkable inasmuch as Antwerp is on the right bank of the river, as is also the whole territory of Holland ; and, though no part of that country was part of Flanders, then equally with Holland combined with France in a war with Great Britain. ' It was just as lawful,' as Sir W. Scott observed, ' to blockade the port of Flanders as those of Holland,' and the Scheldt might have been included in the blockade, but he would not hold it necessarily included in the absence of an express declaration.

This case seems to be in point.

It is impossible to say, therefore, in the absence of an express declaration to that effect, that it was the intention of the government to blockade the mouth of the Rio Grande. And we are the less inclined to say it, because we are not aware of any instance in which a belligerent has attempted to blockade the mouth of a river or harbor occupied on one side by neutrals, or in which such a blockade has been recognized as valid by any court administering the law of nations. |

p. 53 The only case which lends even apparent countenance to such a doctrine, is that of *The Maria*,[2] adjudged by Sir W. Scott in 1805. The cargo in litigation had been conveyed from Bremen, through the Weser to Varel, near the mouth of the Jahde, and there transshipped for America. The mouth of the Weser was then blockaded, and Sir W. Scott held, that the commerce of Bremen, though neutral, could not be carried on through the Weser. This, he admitted, was a great inconvenience to the neutral city, which had no other outlet to the sea ; but it was an incident of her situation and of war. It happened in that case that a relaxation of the blockade in favor of Bremen warranted restitution. Otherwise there can be no doubt that the cargo would have been reluctantly condemned.

But it is an error to suppose this case an authority for an American blockade of the Rio Grande, affecting the commerce of Matamoras. Counsel were mistaken in the supposition that only one bank of the Weser

[1] 4 Robinson, 63.

[2] 6 Robinson, 201.

was occupied by the French, and that Bremen was on the other. Both banks were in fact so held, and the blockade was warranted by the hostile possession of both. The case would be in point had both banks of the Rio Grande been in rebel occupation.

Still less applicable to the present litigation is the case of *The Zelden Rust*, cited at the bar. That was not a case of violation of blockade at all. It was a question of contraband, depending on destination. The Zelden Rust, a neutral vessel, entered the Bay or River De Betancos, on one side of which was Ferrol, and on the other Corunna. Counsel argued on the supposition that Ferrol was a belligerent and Corunna was a neutral port, whereas both were belligerent; and the cargo was condemned on the ground of actual or probable destination to Ferrol, which was a port of naval equipment; though nominally destined to Corunna, also a port of naval equipment, though not to the same extent as Ferrol. There was no blockade of the bay or river or of either town.

It is unnecessary to examine other cases referred to by | counsel. It is p. 54
sufficient to say that none of them support the doctrine that a belligerent can blockade the mouth of a river, occupied on one bank by neutrals with complete rights of navigation.

We have no hesitation, therefore, in holding that the mouth of the Rio Grande was not included in the blockade of the ports of the rebel States, and that neutral commerce with Matamoras, except in contraband, was entirely free.

If we had any doubt upon the subject, it would be removed by the fact that it was the known and constant practice of the government to grant clearances for Matamoras from New York, on condition of giving bond that no supplies should be furnished to the rebels—a condition necessarily municipal in its nature and inapplicable to any clearance for a foreign port. These clearances are incompatible with the existence of the supposed blockade.

We come next to the question whether an ulterior destination to the rebel region, which we now assume as proved, affected the cargo of the Peterhoff with liability to condemnation. We mean the neutral cargo; reserving for the present the question of contraband, and questions arising upon citizenship or nationality of shippers.

It is an undoubted general principle, recognized by this court in the case of *The Bermuda*, and in several other cases, that an ulterior destination to a blockaded port will infect the primary voyage to a neutral port with liability for intended violation of blockade.

The question now is whether the same consequence will attend an ulterior destination to a belligerent country by inland conveyance. And upon this question the authorities seem quite clear.

During the blockade of Holland in 1799, goods belonging to Prussian

subjects were shipped from Edam, near Amsterdam, by inland navigation to Emden, in Hanover, for transshipment to London. Prussia and Hanover were neutral. The goods were captured on the voyage from Emden,
p. 55 and the cause[1] came before the British Court of Admiralty in | 1801. It was held that the blockade did not affect the trade of Holland carried on with neutrals by means of inland navigation. 'It was,' said Sir William Scott, 'a mere maritime blockade effected by force operating only at sea.' He admitted that such trade would defeat, partially at least, the object of the blockade, namely, to cripple the trade of Holland, but observed, 'If that is the consequence, all that can be said is that it is an unavoidable consequence. It must be imputed to the nature of the thing which will not admit a remedy of this species. The court cannot on that ground take upon itself to say that a legal blockade exists where no actual blockade can be applied. . . . . It must be presumed that this was foreseen by the blockading state, which, nevertheless, thought proper to impose it to the extent to which it was practicable.'

The same principle governed the decision in the case of *The Ocean*,[2] made also in 1801. At the time of her voyage Amsterdam was blockaded, but the blockade had not been extended to the other ports of Holland. Her cargo consisted partly or wholly of goods ordered by American merchants from Amsterdam, and sent thence by inland conveyance to Rotterdam, and there shipped to America. It was held that the conveyance from Amsterdam to Rotterdam, being inland, was not affected by the blockade, and the goods, which had been captured, were restored.

These were cases of trade from a blockaded to a neutral country, by means of inland navigation, to a neutral port or a port not blockaded. The same principle was applied to trade from a neutral to a blockaded country by inland conveyance from the neutral port of primary destination to the blockaded port of ulterior destination in the case of the *Jonge Pieter*,[3] adjudged in 1801. Goods belonging to neutrals going from London to Emden, with ulterior destination by land or an interior canal navigation to Amsterdam, were held not liable to seizure for violation of the blockade of that port. The particular goods in that instance were
p. 56 condemned | upon evidence that they did not in fact belong to neutrals, but to British merchants, engaged in unlawful trade with the enemy; but the principle just stated was explicitly affirmed.

These cases fully recognize the lawfulness of neutral trade to or from a blockaded country by inland navigation or transportation. They assert principles without disregard of which it is impossible to hold that inland trade from Matamoras, in Mexico, to Brownsville or Galveston, in Texas, or from Brownsville or Galveston to Matamoras, was affected by the blockade of the Texan coast.

[1] The Stert, 4 Robinson, 65. [2] 3 Robinson, 297. [3] 4 Id. 79.

And the general doctrines of international law lead irresistibly to the same conclusion. We know of but two exceptions to the rule of free trade by neutrals with belligerents : the first is that there must be no violation of blockade or siege ; and the second, that there must be no conveyance of contraband to either belligerent. And the question we are now considering is, ' Was the cargo of the Peterhoff within the first of these exceptions ? ' We have seen that Matamoras was not and could not be blockaded ; and it is manifest that there was not and could not be any blockade of the Texan bank of the Rio Grande as against the trade of Matamoras. No blockading vessel was in the river ; nor could any such vessel ascend the river, unless supported by a competent military force on land.

The doctrine of *The Bermuda* case, supposed by counsel to have an important application to that before us, has, in reality, no application at all. There is an obvious and broad line of distinction between the cases. The Bermuda and her cargo were condemned because engaged in a voyage ostensibly for a neutral, but in reality either directly or by substitution of another vessel, for a blockaded port. The Peterhoff was destined for a neutral port with no ulterior destination for the ship, or none by sea for the cargo to any blockaded place. In the case of the Bermuda, the cargo destined primarily for Nassau could not reach its ulterior destination without violating the blockade of the rebel ports ; in the case before us the cargo, destined primarily for Matamoras, | could reach an ulterior p. 57
destination in Texas without violating any blockade at all.

We must say, therefore, that trade, between London and Matamoras, even with intent to supply, from Matamoras, goods to Texas, violated no blockade, and cannot be declared unlawful.

Trade with a neutral port in immediate proximity to the territory of one belligerent, is certainly very inconvenient to the other. Such trade, with unrestricted inland commerce between such a port and the enemy's territory, impairs undoubtedly and very seriously impairs the value of a blockade of the enemy's coast. But in cases such as that now in judgment, we administer the public law of nations, and are not at liberty to inquire what is for the particular advantage or disadvantage of our own or another country. We must follow the lights of reason and the lessons of the masters of international jurisprudence.

The remedy for inconvenience of the sort just mentioned is with the political department of the government. In the particular instance before us, the Texan bank of the Rio Grande might have been occupied by the national forces ; or with the consent of Mexico, military possession might have been taken of Matamoras and the Mexican bank below. In either course Texan trade might have been entirely cut off. Sufficient reasons, doubtless, prevailed against the adoption of either. The inconvenience

of either, at the time, was doubtless supposed to outweigh any advantage that might be expected from the interruption of the trade.

What has been said sufficiently indicates our judgment that the ship and cargo are free from liability for violation of blockade.

We come then to other questions.

Thus far we have not thought it necessary to discuss the question of actual destination beyond Matamoras. Nor need we now say more upon that general question than that we think it a fair conclusion from the whole evidence that the cargo was to be disposed of in Mexico or Texas
p. 58 as might be found most convenient and profitable to the owners and | consignees, who were either at Matamoras or on board the ship. Destination in this case becomes specially important only in connection with the question of contraband.

And this brings us to the question: Was any portion of the cargo of the Peterhoff contraband?

The classification of goods as contraband or not contraband has much perplexed text writers and jurists. A strictly accurate and satisfactory classification is perhaps impracticable; but that which is best supported by American and English decisions may be said to divide all merchandise into three classes. Of these classes, the first consists of articles manufactured and primarily and ordinarily used for military purposes in time of war; the second, of articles which may be and are used for purposes of war or peace, according to circumstances; and the third, of articles exclusively used for peaceful purposes.[1] Merchandise of the first class, destined to a belligerent country or places occupied by the army or navy of a belligerent, is always contraband; merchandise of the second class is contraband only when actually destined to the military or naval use of a belligerent; while merchandise of the third class is not contraband at all, though liable to seizure and condemnation for violation of blockade or siege.

A considerable portion of the cargo of the Peterhoff was of the third class, and need not be further referred to. A large portion, perhaps, was of the second class, but is not proved, as we think, to have been actually destined to belligerent use, and cannot therefore be treated as contraband. Another portion was, in our judgment, of the first class, or, if of the second, destined directly to the rebel military service. This portion of the cargo consisted of the cases of artillery harness, and of articles described in the invoices as 'men's army bluchers,' 'artillery boots,' and 'government regulation gray blankets.' These goods come fairly under the description
p. 59 of goods primarily and ordinarily used | for military purposes in time of war. They make part of the necessary equipment of an army.

[1] Lawrence's Wheaton, 772–6, note; The Commercen, 1 Wheaton, 382; Dana's Wheaton, 629, note; Parsons' Mar. Law, 93–4.

It is true that even these goods, if really intended for sale in the market of Matamoras, would be free of liability : for contraband may be transported by neutrals to a neutral port, if intended to make part of its general stock in trade. But there is nothing in the case which tends to convince us that such was their real destination, while all the circumstances indicate that these articles, at least, were destined for the use of the rebel forces then occupying Brownsville, and other places in the vicinity.

And contraband merchandise is subject to a different rule in respect to ulterior destination than that which applies to merchandise not contraband. The latter is liable to capture only when a violation of blockade is intended ; the former when destined to the hostile country, or to the actual military or naval use of the enemy, whether blockaded or not. The trade of neutrals with belligerents in articles not contraband is absolutely free unless interrupted by blockade ; the conveyance by neutrals to belligerents of contraband articles is always unlawful, and such articles may always be seized during transit by sea. Hence, while articles, not contraband, might be sent to Matamoras and beyond to the rebel region, where the communications were not interrupted by blockade, articles of a contraband character, destined in fact to a State in rebellion, or for the use of the rebel military forces, were liable to capture though primarily destined to Matamoras.

We are obliged to conclude that the portion of the cargo which we have characterized as contraband must be condemned.

And it is an established rule that the part of the cargo belonging to the same owner as the contraband portion must share its fate. This rule is well stated by Chancellor Kent, thus : ' Contraband articles are infectious, as it is called, and contaminate the whole cargo belonging to the same owners, and the invoice of any particular article is not usually admitted to exempt it from general confiscation.' |

So much of the cargo of the Peterhoff, therefore, as actually belonged p. 60
to the owner of the artillery harness, and the other contraband goods, must be also condemned.

Two other questions remain to be disposed of.

The first of these relates to the political status of Redgate, one of the owners of the cargo. It was insisted, in the argument for the government, that this person was an enemy, and that the merchandise owned by him was liable to capture and confiscation as enemy's property.

It appears that he was by birth an Englishman ; that he became a citizen of the United States ; that he resided in Texas at the outbreak of the rebellion ; made his escape ; became a resident of Matamoras ; had been engaged in trade there, not wholly confined, probably, to Mexico ; and was on his return from England with a large quantity of

goods, only a small part of which, however, was his own property, with the intention of establishing a mercantile house in that place.

It has been held, by this court, that persons residing in the rebel States at any time during the civil war must be considered as enemies, during such residence, without regard to their personal sentiments or dispositions.[1]

But this has never held in respect to persons faithful to the Union, who have escaped from those States, and have subsequently resided in the loyal States, or in neutral countries. Such citizens of the United States lost no rights as citizens by reason of temporary and constrained residence in the rebellious portion of the country.

And to this class Redgate seems to have belonged. He cannot, therefore, be regarded as an enemy. If his property was liable to seizure at all on account of his political character, it was as property of a citizen of the United States, proceeding to a State in insurrection. But we see no sufficient ground for distinguishing that portion of the cargo owned by him, as to destination, from any other portion. |

p. 61 The other question relates to costs and expenses.

Formerly conveyance of contraband subjected the ship to forfeiture; but in more modern times, that consequence, in ordinary cases, attaches only to the freight of the contraband merchandise. That consequence only attaches in the present case.

But the fact of such conveyance may be properly taken into consideration, with other circumstances, in determining the question of costs and expenses.

It was the duty of the captain of the Peterhoff, when brought to by the Vanderbilt, to send his papers on board, if required. He refused to do so. The circumstances might well excite suspicion. The captain of a merchant steamer like the Peterhoff is not privileged from search by the fact that he has a government mail on board; on the contrary he is bound by that circumstance to strict performance of neutral duties and to special respect for belligerent rights.

The search led to the belief on the part of the officers of the Vanderbilt that there was contraband on board, destined to the enemy. This belief, it is now apparent, was warranted. It was therefore the duty of the captors to bring the Peterhoff in for adjudication, and clearly they are not liable for the costs and expenses of doing so.

On the other hand, not only was the captain in the wrong in the refusal just mentioned, but it appears that papers were destroyed on board his ship at the time of capture. Some papers were burned by a passenger named Mohl, or by his directions. A package was also thrown overboard by direction of the captain. This package is variously described by the

[1] Prize Cases, 2 Black, 666, 687–8; The Venice, 2 Wallace, 258; Mrs. Alexander's Cotton, Id. 404.

witnesses as a heavy sealed package wrapped in loose paper; as a box of papers; and as a packet of despatches sealed up in canvas and weighted with lead. By the captain it is represented as a package belonging to Mohl, and containing a white powder. We are unable to credit this representation. It is highly improbable that, under the circumstances described by the captain, he would have thrown any package overboard at such a time, and with the plain intent of concealing it from the captors, if it contained | nothing likely, in his opinion, to prejudice the case of the p. 62
ship and cargo.

We must say that his conduct was inconsistent with the frankness and good faith to which neutrals, engaged in a commerce open to great suspicion, are most strongly bound. Considering the other facts in the case, however, and the almost certain destination of the ship to a neutral port, with a cargo, for the most part, neutral in character and destination, we shall not extend the effect of this conduct of the captain to condemnation, but we shall decree payment of costs and expenses by the ship as a condition of restitution.

DECREE ACCORDINGLY.

United States v. Weed et al.

(5 Wallace, 62) 1866.

1. When the record presents a case in this court which has been prosecuted exclusively as prize, the property cannot be here condemned as for a statutory forfeiture.
2. When the record presents a case prosecuted below on the instance side of the court, for forfeiture under a statute, it cannot here be condemned as prize.
3. In either of these cases, if the facts disclosed in the record justify it, the case will be remanded to the court below for a new libel, and proper proceedings according to the true nature of the case.
4. In the present case, which was prosecuted as prize of war exclusively, the facts did not prove a case of prize, nor did they show a probable case of violation of any statutes. A decree of the court below dismissing the libel and restoring the property was therefore affirmed.
5. Permits granted during the late rebellion by the proper licensing agents to purchase goods in a certain locality, are *primâ facie* evidence that the locality is properly within the trade regulations of that department.

APPEAL from the District Court of the United States for the Eastern District of Louisiana; the case being thus:

On the 15th of April, 1864, the steamer A. G. Brown was boarded in the Atchafalaya River, while on her way to Brashear City, by the United States gunboat Wyanza, Captain | Washburne, and after some investiga- p. 63
tion the cargo of the Brown was pronounced prize of war. She followed the gunboat into Brashear City, her cargo was landed there, and put on the railroad which connects that place with New Orleans, and sent to the

latter city in charge of a person calling himself a prize-master. No attempt was made to detain the A. G. Brown. About a week afterwards she landed at Brashear City, on her return from another expedition, and as soon as she touched the shore Captain Washburne came on board of her, declared her cargo prize of war, and sent that also to New Orleans by railroad. These cargoes consisted of sugar and molasses.

At New Orleans the first cargo arrived in two instalments. On the arrival of the first a libel was filed against it, *in prize*, in the District Court for the Eastern District of Louisiana, by the attorney of the United States for that district. Shortly after this the second instalment of the first capture, and all of the second capture, arrived at New Orleans, whereupon an amended or supplemental libel, *equally in prize*, was filed against all the goods of both seizures.

The property, on its arrival, was placed in the hands of prize commissioners, depositions *in preparatorio* were taken, and the litigation pursued and ended as if it were a single capture. It was only by the most diligent search of the record that one was enabled to discover what goods were taken in the first capture and what in the second.

As soon as the case was fairly begun in the District Court, C. A. Weed filed his claim for the sugar and molasses of the first capture, alleging that he was the owner of it; that he was a loyal citizen of New Orleans; that he had purchased the property in the Parish of *St. Mary*, Louisiana, under a license from the proper treasury agents, and was transmitting it to New Orleans, when it was seized. F. Blydenburgh filed a claim, with similar statements, for the sugar of the second capture, stating, however, that he had bought it under a license which authorized him to ' transport the same from the Parish of *St. Martin's*.' Both claims, which were
p. 64 sworn to, were quite full in stating the circumstances connected | with the purchases and loyalty of the region where made and through which the property passed.

During the progress of the case the claimant made a motion to dismiss the proceedings in prize, and transfer the case to the instance side of the court. This motion was disregarded; but, on final hearing, the District Court dismissed the libel and ordered restitution of the property. From that decree the United States appealed to this court.

The vessel on which the goods were seized was the property of the government of the United States, in the employment and control of the quartermaster's department of General Banks's army at the time of the seizure,—the government receiving $3000 for the use of the vessel. An officer of this department accompanied the expedition, which went from Brashear City for the goods, and was on board when she was overhauled by the gunboat. The vessel was manned by officers and men in the service of the government. There was also on board a file of United States

soldiers, under the command of a captain of the army, who were detailed for the expedition by order of the colonel in command. The only person known to be on board not in the service of the government was the person who acted as agent for the claimant of the goods. Brashear City was in possession of our forces, and had been for several months, and the vessel was only returning to her proper place when she was captured in the first instance, and was lying there when boarded, in the second. Her voyage did not, in either case, extend beyond the region of country which was under the control of the military authorities of the government at that time.

As to the cargoes.

Weed's had been brought from the parish of St. Mary. Blydenburgh's came from the parish of *St. Martin*, on the shore of the Grand River, a little below a place called *Butte la Rose*. The Grand River was apparently the boundary between the two parishes. The district is on the Gulf of Mexico, and is indented on the Gulf side by several bays, with numerous islands, creeks, &c., divided by two or three | navigable rivers, broken by p. 65
swamps and lakes, and traversed in every direction by numberless bayous and watercourses; facts which rendered the absence of a public enemy a fact not so easy to be ascertained.

It appeared, however, in this case that the district was in the control of the United States; that the President had designated by proclamation, on the 1st of January previous, the parish of St. Mary and apparently the whole region through which that cargo was to pass, as not in rebellion. Various places in the parish of St. Mary had been named by the commanding general as the places where delegates from the State were to assemble on the 22d February, 1864, to appoint State officers, and on the first Monday of April following, to make a State constitution.

The licenses, which were produced in court, and had all usual *indicia* of regularity, were to purchase within 'the country known as the parish of St. Mary, Louisiana,' and both had at the top of them the words, 'This permit will accompany the shipment, and be surrendered at the custom-house.' No papers were found with the goods.

Mr. Ashton, Assistant Attorney-General, for the United States, appellants:

Conceding, for the sake of argument simply, that the property was not enemy property, and so liable to confiscation as prize of war, it is yet so for violation of municipal law, and the court below should not have ordered restitution.

Licenses of this character are strictly construed. The rule against constructive license is probably the sternest principle known to the law.[1] Even where the licensee was deceived by the course of the captor's government, a persuasive equity could not relieve him.[2] The party who uses a license 'engages not only for fair intentions, but for an

[1] The Hoop, 1 Robinson, 216.

[2] The Charlotta, 1 Dodson, 387–393.

accurate interpretation of the permit.'[1] The claimant in a prize court is |
p. 66 an actor, and must make out his case.[2] During the late rebellion, for the best of reasons, the doubt seems to have gone in this court against the individual, in deference to controlling public objects.[3]

Now in this case there are various difficulties.

1. The first words of the documents are these: '*This permit will accompany the shipment and be surrendered at the custom-house.*' The case shows that the license did not accompany the merchandise; nor did any other papers. This was a violation of the conditions of the license, which, by its own terms, was thus avoided.

2. The merchandise in suit is not identified with the alleged permits, or as the property of the claimant. The onus of an intervenor is nowhere more pressing than on this point. Quantity is one of the elements of identity where a lot of merchandise is in question. In this case the property claimed here by Weed is of a quantity precisely stated in the libels.

3. As respects Blydenburgh's license. The permit was to purchase in and transport from '*St. Mary's* parish.' Blydenburgh's own statement in his claim shows that the whole transaction was in '*St. Martin's* parish.' For this he does not pretend to have had any license.

Mr. Coffey, contra, for the claimant.

Mr. Justice MILLER delivered the opinion of the court.

If this case is to be disposed of here, upon the answer to be given to the question of prize or no prize, there can be no doubt that the decree of the District Court must be affirmed.

There can on the facts be no pretence that there was any attempt to break a blockade, nor can it be held that the cargoes were enemy property. No person hostile to the United States is mentioned in argument or otherwise as probable owner of any part of them. Can the
p. 67 places from | which the goods were brought impress upon them the character of enemy property? They were the products of those islands of Louisiana found in the bayous of that region, and were undoubtedly taken by the vessel from near the places of their production. These places, as we have seen, were under the military control of our authorities; and the parishes of St. Mary and St. Martin were then represented in a convention of loyal citizens, called to frame a constitution under which a government was organized for the State, hostile to the rebellion, and acceptable to the military commander of that department.

The regularly authorized agents of the Treasury Department were also issuing licenses to trade in these parishes, under the act of July 13th, 1861, and the regulations of the Treasury Department made under that

[1] Lord Stowell, The Cosmopolite, 4 Robinson, 13.
The Amiable Isabella, 6 Wheaton, 77. [3] The Reform, 3 Wallace, 628.

act and other acts of Congress. It is not possible to hold, therefore, that property arriving from these parishes was, for that reason alone, to be treated as enemy property, in the sense of a prize court.

Whether it is liable to forfeiture for an illegal traffic, as being in violation of those regulations and acts of Congress, will be considered hereafter; but the question must be determined upon other considerations than those which govern a prize court.

The question of prize or no prize must therefore be answered in the negative.

But it is said, in behalf of the government, that if the property in controversy is not subject to condemnation as prize of war, it is liable to confiscation as having been purchased in violation of the acts of Congress, and the trade regulations established in pursuance of those acts.

Before entering upon this inquiry a preliminary question of some importance presents itself, which must be first disposed of.

The pleadings, the testimony, and the conduct of the case have been governed exclusively, from its commencement, upon the idea of prize proceedings. The libel is a very general allegation of property captured as prize. Not a word is found in the pleadings of the case which alleges any | fact rendering the property liable to confiscation under the acts of p. 68
Congress. A large part of the testimony consists of depositions taken *in preparatorio*, where the claimants had no opportunity of cross-examination. If, under these circumstances, there is found in the testimony sufficient evidence to convince us that the property is liable to statutory confiscation, can we condemn it in this proceeding? Or, if we cannot condemn, must we, on the other hand, restore it to the claimants?

It would seem to violate all rules of pleading, as well as all the rules of evidence applicable to penal forfeitures, to hold that in such circumstances we can proceed to condemnation. The right of the claimant to be informed by the libel of the specific act by which he or his property has violated the law, and to have an opportunity to produce witnesses, and to cross-examine those produced against him, are as fully recognized in the admiralty courts, in all except prize cases, as they are in the courts of common law.

In the case of *The Schooner Hoppet*,[1] the vessel was proceeded against for a forfeiture under the act to interdict commercial intercourse with France, and this court, by C. J. Marshall, says, that the first question made for its consideration is whether the information will support a sentence of condemnation. After stating the substance of the pleading, and the rule which governs the common law courts, he proceeds: 'Does this rule apply to informations in a court of admiralty? It is not contended that all those technical niceties, which are unimportant in them-

[1] 7 Cranch, 389.

selves, and standing only on precedents of which the reason cannot be discerned, should be transplanted from the courts of common law in a court of admiralty. But a rule so essential to justice and fair proceeding, as that which requires a substantial statement of the offence upon which the prosecution is founded, must be the rule of every court where justice is its object, and cannot be satisfied by a general reference to the pro-
p. 69 visions of the statute.' He then asks if this defect of the | pleading be cured by any evidence showing that in point of fact the vessel and cargo are liable to forfeiture, and holds that it cannot.

In the case of *The Brig Caroline*,[1] this case is affirmed, and the principle applied to a libel filed against a vessel for violating the act of Congress concerning the slave trade.[2]

The claimants, on the other hand, insist that as the evidence does not sustain a case within the prize jurisdiction of the court, the libel must be dismissed, and the property restored.

This might be true if the prize court of this country was a court sitting under a special commission, as it is in England, for that commission must then be the limit of its power. But such is not the case here. The District Court holds both its prize jurisdiction and its jurisdiction as an instance court of admiralty from the Constitution and the act of Congress, and it is but one court, with these different branches of admiralty jurisdiction, as well as cognizance of other and distinct subjects.

The case of *Jecker* v. *Montgomery*,[3] in this court, is instructive, if not conclusive, on the point we are now considering.

In that case Captain Montgomery had, during the Mexican war, taken as prize the Admittance, an American vessel, and her cargo, for illegal trade with the enemy on the coast of California. He had carried his capture before a court claiming prize jurisdiction in that region, organized by the authority of the commanding general, and she was by that court condemned and sold. After this the owners of the vessel and cargo filed a libel in admiralty, in the instance side of the court, in the District of Columbia, against the captor ; alleging that the capture was wrongful, and the condemnation illegal, and they prayed for restitution of their
p. 70 property, or that Captain Montgomery might be compelled | to bring the captured property into that court, or some other court of competent jurisdiction, and institute there the proper proceeding for its condemnation. Captain Montgomery answered, and insisted that his capture was lawful prize, and that the proceedings in the prize court in California were valid. Demurrers to the answer were filed, and on these pleadings the libel was dismissed.

[1] 7 Cranch, 496.
[2] See, also, The Samuel, 1 Wheaton, 9 ; The Mary Anne, 8 Id. 380.
[3] 13 Howard, 498.

On appeal to the Supreme Court, it was held that the prize court of California was without authority and its decree void. But, although the parties were before the court, and sufficient cause for the capture was stated in the answer, and sufficient excuse shown for not proceeding to a valid adjudication—all of which was admitted by the demurrer of the claimants—this court reversed the decree dismissing the libel, and remanded the case, with directions that the captor should institute proceedings in prize for the condemnation of his capture, and if he did not do so within a reasonable time the court should proceed against him on the libel of claimants for a marine trespass.

The court said that 'the necessity of proceeding to condemnation in prize does not arise from any distinction between the instance court of admiralty and the prize court. Under the Constitution of the United States the instance court of admiralty and the prize court of admiralty are the same court, acting under one commission. Still, however, the property cannot be condemned as prize under this libel, nor would its dismissal be equivalent to a condemnation, nor recognized as such by foreign courts. The libellants allege that the goods were neutral, and not liable to capture, and their right to them cannot be divested until there is a sentence of condemnation against them as prize of war. And, as that sentence cannot be pronounced against them in the present form of the proceeding, it becomes necessary to proceed in the prize jurisdiction of the court, where the property may be condemned or acquitted by the sentence of the court, and the whole controversy finally settled.'

In that case it was determined that the case must be remitted to the court in prize, because, under the libel and | mode of proceeding in the p. 71
instance side of the court, the question of prize or no prize could not be definitely settled. The case before us is the converse of that. We have here a case where all the proceedings are in prize, and according to the mode of proceeding in prize courts, but the case for the government, if it can be sustained at all, is not a case of prize, but of forfeiture under municipal law. We think the reasons are quite as strong why this court should not condemn the property in this proceeding, even if liable to forfeiture on the facts, as they are for refusing to condemn a prize on a libel filed on the instance side of the court. What, then, shall be done with the property, if the facts in the record prove a liability to forfeiture under the statute?

In the case of *The Schooner Adeline*,[1] where this precise question was raised, it was not found necessary to decide it, because the proceeding being in prize, this court held that the facts proved it to be a prize case. But Mr. Justice Story, in delivering the opinion of the court, responding to the argument that the case was salvage and not prize, and therefore

[1] 9 Cranch, 244.

the libel should be dismissed, said: 'If, indeed, there were anything in this objection, it cannot, in any beneficial manner, avail the defendants. The most that could result would be, that the case would be remanded to the Circuit Court, with direction to allow an amendment of the libel. Where merits clearly appear on the record, it is the settled practice in admiralty proceedings not to dismiss the libel, but to allow the party to assert his rights in a new allegation.'

This practice was also followed in the case of *Mrs. Alexander's Cotton*.[1] In that case the cotton had been libelled as prize of war. This court was of opinion that it was not a case of prize, but that it came within the statute covering captured and abandoned property. The court did not, for that reason, affirm the decree of the District Court, which had restored the property, or its proceeds, to Mrs. Alexander,
p. 72 but reversed that decree, and remanded the case to the District | Court, that it might dispose of the proceeds of the sale of the property, then in the registry, according to the opinion of the court.

Our inquiries into this subject, guided and supported by the decisions of this court, lead to the establishment of two propositions:

1. That when a case has been prosecuted as prize in the modes in use in the prize courts, which the facts in the record show not to be prize, but a case of forfeiture under statute, this court will remand the case for further proceedings in the court below.

2. That where a case has been in like manner prosecuted in the instance court, which, on the facts presented, this court is of opinion is a case for a prize court, it will be remanded for proceedings in prize.

We have already seen that the present is not, on the facts, a case of prize. The first of the above propositions establishes the rule that we cannot, under this proceeding, condemn the property for a forfeiture under the statute. It remains to be determined whether we shall affirm the decree of the District Court restoring the property, or remand the case for further proceedings on the question of municipal forfeiture. For this purpose we must examine, for a moment, the testimony before us.

We have already seen that the goods were purchased in those parishes of Louisiana which were occupied by our military forces, and which were under their control, and which were also represented in the effort to establish a loyal State government. It also appears that the legally appointed agents of the Treasury Department were in the habit of issuing permits to trade in those parishes.

The claimants allege that they made the purchases under licenses obtained from these agents, that they were fair and honest transactions, and that they themselves are loyal citizens of New Orleans. The facts

[1] 2 Wallace, 404.

of the purchase are stated with particularity, and under oath. The permits, or licenses, are produced and filed in court, and seem to us to be regular | in form and properly issued. It cannot be supposed that p. 73
this court can take judicial notice of the varying lines of the Federal army of occupation in those remote regions, but the fact that the proper officers issued these permits for certain parishes, must be taken as evidence that they were properly issued, until the contrary is established. The facts, also, that the goods were brought in by a government vessel, for the use of which government received $3000, commanded by government officers, and guarded by government troops, ordered for the purpose by the post commander, are circumstances not to be disregarded in a matter of this kind.

It is objected that the permits were not found with the goods, as the regulations direct. This was merely directory, and would not of itself work a forfeiture of the goods. But they probably were on board with the goods when the latter were seized, and the holder of them may have felt justified in not delivering this evidence of his good faith to a gentleman who seemed willing to let the *vessel* do all she could in this traffic, so long as he could stand on the shore when she landed her goods, and seize them as prize of war.

It is said there is no proof identifying these goods as those purchased under the permits ; but the affidavits of claimants are full to this point, and are uncontradicted by any testimony in the record. Other witnesses also prove the purchase and payment of these goods by Weed, about the time mentioned in the first of two permits issued to him.

It is said that Blydenburgh's permit was to purchase in the parish of St. Mary, and that his purchase was made in the parish of St. Martin. It is not shown precisely where the purchase was made. The sugar was taken from the shore of Grand River, a little below Butte la Rose. This Grand River seems to be the boundary between the parishes of St. Mary and St. Martin. However, there seems no reason to suppose that Blydenburgh intended to violate the terms of his permit, nor sufficient proof that he did so, in making his purchase. There is much contradictory testimony as to the existence of guerrillas near where the sugar was obtained about the time of its transportation ; but this would seem | to show the necessity for its speedy removal, if the purchase had p. 74
been honestly made.

On the whole, we see no reason to suppose that a case of forfeiture would be made out by the testimony on another trial, as much of that taken *ex parte* by the captors would probably be modified favorably for the claimants on cross-examination.

The decree of the District Court is therefore

AFFIRMED.

The Dashing Wave.

(5 Wallace, 170) 1866.

1. A neutral, professing to be engaged in trade with a neutral port, under circumstances which warrant close observation by a blockading squadron, must keep his vessel, while discharging or receiving cargo, so clearly on the neutral side of the blockading line as to repel, so far as position can repel, all imputation of intent to break the blockade. Neglect of that duty may well justify capture and sending in for adjudication; though, in the absence of positive evidence that the neglect was wilful, it might not justify a condemnation.
2. Where a party, whose national character does not appear, gives his own money to a neutral house, to be shipped with money of that house and in their name, to a neutral port in immediate proximity to a blockaded region, and an attorney in fact, on capture of the money and libel of it as prize, states that such neutral house are the owners thereof, and that 'no other persons are interested therein,' the capture and sending in will be justified; though in the absence of proof of an enemy's character in the party shipping his money with the neutral's, a condemnation may not be.
3. On a capture of a vessel unobservant, through mere carelessness, of the duty first above mentioned, and containing money shipped under the circumstances just stated, a decree was made restoring the vessel and cargo, including the money; but apportioning the costs and expenses consequent on the capture ratably between the vessel and the coin, exempting from contribution the rest of the cargo.

During the late Rebellion, and while the coast of the Southern States, including that of Texas to the mouth of the Rio Grande, was under blockade by the United States, the Dashing Wave, a British-owned brig, was captured at anchor by a United States gunboat, off
p. 171 the mouth of that river, the dividing | stream between the United States and Mexico, a neutral, and libelled as prize of war in the District Court of New Orleans. The vessel was employed as a general ship on a voyage from Liverpool to Matamoras, a Mexican town on the Rio Grande, directly opposite to Texas. She had been freighted at Liverpool in 1862 with an assorted cargo, consigned by ten or more shippers to various persons and firms described as resident at Matamoras. There was no contraband aboard. The most remarkable shipment was one of £12,000 gold coin, in the name of Lizardi & Co., British subjects of Liverpool. By claim put in after the libel filed for Lizardi & Co., by their agent at New Orleans, it was claimed as their property, it being stated that no other persons were interested therein. Correspondence found on board the captured vessel showed, however, that £7000 of the £12,000 were owned by one H. N. Caldwell, and had been shipped to the Matamoras consignee for the purchase of cotton either in Texas or Matamoras on the joint account of Lizardi & Co. and Caldwell.

The residence and business of Caldwell were not fully disclosed in the record. It did not appear that he was a British merchant, nor that

he had any commercial domicil in Mexico, nor yet that he was a rebel enemy. He had apparently married in England shortly before the vessel sailed, and was on board with his wife and servant at the time of capture. The nationality of the wife and servant the captain stated to be English ; but he did not know what that of Caldwell was. They were all permitted to go ashore with their luggage by the boarding officer. Caldwell had, apparently, no interest in the vessel or cargo. He appeared, by the letters, to have been engaged in cotton transactions, and to have proposed to Lizardi & Co. the plan of shipping all the gold to Mexico as their own property. Caldwell made no claim for any part of the gold, nor did he personally appear in any way in the case.

On the proofs *in preparatorio* the place of capture, as respecting the middle or dividing line of the Rio Grande, appeared doubtful. |

The testimony of naval witnesses, examined under an order which p. 172
had been obtained by the captors for further proof as to the place of capture and the character of the cargo, asserted that the vessel, when seized, was on the northern, that is to say, the American side, of the boundary line, and in our waters. The master swore to the contrary.

In point of fact, as appeared by a Coast Survey chart, on which her exact position was marked by a witness of the captors, the master was wrong. The vessel was in waters actually blockaded. The position of the vessel made access to our coast, then in possession of enemy rebels, and under blockade, as easy as to that of Mexico, a neutral. (See chart above.)

The District Court at New Orleans made two decrees : one restoring the vessel and cargo—a decree from which the United States now

appealed; the second refusing damages and ordering payment of costs and charges (exceeding $12,000) by the claimants—from which decree the claimants appealed.

Mr. Ashton, Assistant Attorney-General, for the United States:

1. The position of the vessel, even if in Mexican waters, was so dubious as justly to expose her and her cargo to condemnation for violating blockade. She had no right to put herself in a position where she could, by night or in a moment when the blockading fleet was distant, land her cargo on the coast of Texas, a coast unquestionably blockaded.

2. There should be no final decree of restitution without *further proof* adduced by the claimants touching the commercial domicil and nationality of Caldwell.

The record contains no evidence in favor of the neutral character of Caldwell, but, on the contrary, it strongly suggests that he was a hostile person. His presence on board the captured vessel with his wife and servant; the professed ignorance of the master and mates of the nationality and business of the party; the suggestion, in his correspondence with Lizardi & Co. that the gold,—of which he himself owned the largest
p. 174 part,—should be covered and consigned, | in the bill of lading, as the neutral property of the British house; the previous commercial dealings of the party as inferable from his correspondence; the rash or false statement by the attorney that no one but the Lizardis were interested in the gold, are sufficient, in a prize court, to warrant inference of his unneutral character, in the absence of clear proof to the contrary.

If the claimants should neglect or fail, upon an order for further proof being made, to establish the neutral character of this party, then the entire property claimed by Lizardi & Co. will be confiscable by reason of the attempt of those parties to cover property of hostile ownership.

In the *Phœnix Insurance Company* v. *Pratt*,[1] the Supreme Court of Pennsylvania held that a neutral master, who was the general agent for a cargo of neutral ownership, subjected the whole property of the principal on board the vessel to condemnation, by attempting to cover in his own name other goods of hostile ownership in the same vessel.

Mr. Marvin and Mr. Evarts, contra; Mr. Evarts for Lizardi & Co.:

I. *As to the vessel and cargo generally.*

1. Neither the vessel nor the cargo was engaged in breaking blockade, for no blockade existed at the mouth of the Rio Grande at the time of the capture.[2]

2. There is no evidence of the existence of any enemy interest in either ship or cargo, and the court will not presume such interest to exist in a trade between one neutral port and another.

[1] 2 Binney, 308; see also Earle *v.* Rowcroft, 8 East, 126.
[2] See the Peterhoff, *supra*.

3. Anchoring in even American waters would of itself be no cause of forfeiture, either under any principle of international law or under any act of Congress. The Rio Grande and the waters leading into and from it are common to the use of both Mexico and the United States, and their use has not been prohibited to neutrals.[1] |

II. *As to the £12,000 gold coin.* p. 175

1. There is no support for a surmise that the consignment was not what the documents show it to be; one, namely, from the shippers, Lizardi & Co., to their consignee, at Matamoras, there to be employed as the means of commercial transactions intrusted to him.

It is not perceived that any question of *enemy property* arises upon the special employment or application of this capital, indicated in the correspondence; which, on the contrary, confirms the integrity of the transaction of the consignment of the specie, and its employment as destined to the actual and active care of the commercial house at Matamoras, to which it was addressed, and in the commerce of that place.

That this money might be applied by the consignee under his instructions from, and accountability to, Lizardi & Co., to trade in cotton, and for account of Caldwell, seems unimportant in its bearing on the question of prize or no prize. Trade in cotton at Matamoras was wholly lawful, no matter what the origin, or who the vendor of the cotton. Nothing appears to expose Caldwell, or his connection with or interest in the possible transactions in which the specie might be used, to any other construction or consequences than would apply to Lizardi & Co.

The opportunity for further proof has been asked for and obtained by the captors, and no damnatory evidence has been produced by them.

2. The capture was wholly unjustifiable, and the restitution decreed should have been attended with damages and costs.

When captors intercept an open prosecution of an apparently lawful trade, and visitation exhibits every trait of honest neutrality, and the commerce thus indicated is not only lawful, but is constantly engaged in by our own vessels, the integrity of the prize courts demands the infliction of damages and costs as a check to the speculative cupidity of captors. The features of this case are not distinguishable | from those p. 176
of the Magicienne, intercepted in her voyage to Matamoras, and brought into Key West. She was promptly restored, the diplomatic claim for damages immediately recognized, and, upon adjustment, paid by authority of an act of Congress.[2]

The CHIEF JUSTICE delivered the opinion of the court.

Two decrees were rendered in the District Court for the Eastern District of Louisiana, the first, directing restitution of the vessel and

[1] The Schooner Fame, 3 Mason, 147; 5 Wheaton, 374.
[2] Diplomatic Correspondence, 1863, Part II, pp. 511, 513, 565, 587, 588, 636.

cargo; the second, refusing damages, and ordering payment of costs and charges by the claimants. The United States appealed from the first; the claimants took an appeal from the second.

The proofs show that the Dashing Wave was a neutral vessel, bound from Liverpool to Matamoras, with a cargo of general merchandise and coin, no part of which was contraband.

It is clear, therefore, that the decree of restitution must be affirmed.

The only question which requires much consideration relates to the rightfulness of capture. And this question resolves itself into two:

1. Was there anything in the position of the Dashing Wave, at the time of capture, which warranted the opinion of the captors that she was engaged in breaking the blockade? and—

2. Was there anything in the papers on board the brig, relating to the cargo, which justified the seizure?

It is claimed for the captors that she was taken in Texan waters, lying convenient to the blockaded coast. The preparatory evidence left her position in much uncertainty, but the testimony taken under the order for further proof, in connection with the chart upon which her position is marked by one of the witnesses, establishes it beyond reasonable doubt. She was anchored north of the line between the
p. 177 Mexican and Texan waters, with as easy access to the land on the rebel as on the Mexican side.

We think it was the plain duty of a neutral claiming to be engaged in trade with Matamoras, under circumstances which warranted close observation by the blockading squadron, to keep his vessel, while discharging or receiving cargo, so clearly on the neutral side of the boundary line as to repel, so far as position could repel, all imputation of intent to break the blockade. He had no right to take, voluntarily, a position in the immediate presence of the blockading fleet, from which merchandise might be so easily introduced into the blockaded region.

We do not say that neglect of duty, in this respect, on the part of the brig, especially in the absence of positive evidence that the neglect was wilful, calls for condemnation; but we cannot doubt that under the circumstances described, capturing and sending in for adjudication was fully warranted.

The other question relates wholly to the papers concerning the shipment of coin. There is no evidence which affects with culpability any other part of the cargo.

The coin is claimed by Lizardi & Co., neutral merchants of Liverpool; but the proof shows that one H. N. Caldwell was the real owner of the larger part of it. A letter, dated August 17th, 1863, and addressed by Caldwell to Lizardi & Co., states his intention, in view of 'the uncertain state of our political affairs,' to take gold to purchase cotton, instead of taking

goods to Mexico, if he can arrange for an advance of £5000, making, with certain credits in his favor with Lizardi & Co., and £3000 which he had in bank, a total of £12,000, with which to operate.

In the same letter he further proposed that the whole amount should be shipped to J. Roman, of Matamoras, as the property of Lizardi & Co. The next day Lizardi & Co. acknowledged the receipt from Caldwell of a check for the £3000 in bank, and agreed to his proposals. Three days later Lizardi & Co. addressed a letter to Roman, advising him of the arrangement with Caldwell, and distinguishing expressly the £5000 advanced by them from 'the other | £7000 of the said gentleman.' These p. 178
letters were found on board the brig.

Caldwell was a passenger on the brig, but was allowed to leave before any question of his character was made. What was that character in fact? Was he a rebel enemy or a neutral?

The tenor of his letter to Lizardi & Co., his proposal that the specie should be shipped as their property, when seven-twelfths of it belonged to himself; and especially the circumstance that he has never made claim in this suit to any part of it, except through Lizardi & Co., indicates that he was not a neutral, but an enemy.

On the other hand, there is no positive proof of his enemy character, though further proof was allowed to the captors.

This evidence, in our judgment, does not warrant condemnation of the specie, but it does, as we think, justify the capture.

We shall therefore affirm the decree of the District Court, restoring the vessel and cargo, but direct that costs and expenses consequent upon the capture, be ratably apportioned between the brig and the shipment of coin, and that the residue of the cargo be exempted from contribution.

DECREE AND DIRECTIONS ACCORDINGLY.

NOTE.

At the same time with the preceding appeal and cross-appeal, and by the same counsel, were argued two cases; one an appeal and cross-appeal, as the preceding, from the District Court of the United States for the Eastern District of Louisiana; the other, an appeal from the same court.

The first case was that of

The Science.

(5 Wallace, 178) 1866.

The Science had been captured by the American war steamer Virginia, on the same day as the Dashing Wave, and the same decrees were entered in the District Court in respect to vessel and cargo, and similar appeals were taken. |

p. 179 *Mr. Ashton, Assistant Attorney-General, for the captors; Mr. Marvin, contra, for the claimants.*

The CHIEF JUSTICE delivered the opinion of the court.

The evidence is clear that the vessel and her outward cargo were neutral property, destined to neutral consignees at Matamoras, and that the cargo had been actually delivered as consigned.

Some of the proof tended to show that a portion of this cargo consisted of confederate uniform cloth; but there was none showing destination to enemy territory or immediate enemy use.

There was, therefore, nothing in the character of the vessel or of the outward cargo which warrants condemnation.

At the time of capture, the bark had the whole or a great part of her homeward cargo on board. It consisted of cotton and a small quantity of copper. The captain had not signed bills of lading, and, upon his preparatory examination, assigned this circumstance as a reason for not being able to give the names of the shippers at Matamoras or of the consignees at Liverpool. The presumption, arising upon the facts proved, is that it was neutral property, which must be restored.

The position of the Science, when her cargo was put on board, and when she was captured, is left in doubt by the depositions of the master and mate; but the testimony of two officers of the Virginia, read as further proof, is explicit that she was in Texan waters,[1] and no excuse is offered for being there.

The principles just declared in the case of the Dashing Wave require, therefore, the affirmation of both decrees of the District Court.

AND THIS IS ORDERED.

The second case was that of

The Volant.

(5 Wallace, 179) 1866.

THE brig Volant had been captured, near the mouth of the Rio
p. 180 Grande, on the 5th of November, 1863, by the United States | steamer Granite City, and, with her cargo, was condemned, by the decree of the District Court for the Eastern District of Louisiana. The case came before this court upon the appeal of the claimants.

Mr. Ashton, Assistant Attorney-General, for the United States; Mr. Marvin, contra, for the claimants.

The CHIEF JUSTICE delivered the opinion of the court.

The proof shows that the brig was the property of a neutral merchant of the island of Jersey, fully documented as a British merchantman, and regularly cleared from London to Matamoras.

[1] See chart, *supra*, p. 1663.—REP.

The cargo was shipped by the charterers of the vessel for neutral owners, and consigned to neutrals at Matamoras, but had not been discharged at the time of capture.

It consisted in part of bales of confederate uniform cloth, of the same mark and of corresponding numbers with like goods found on the Science; but there is no proof of unlawful destination.

The brig, however, anchored in Texan waters, near the coast, and remained there until captured.[1]

This circumstance alone did not warrant condemnation, though, in connection with the character of the cargo, it justified capture.

The decree of the District Court must be reversed; and a decree of restitution, on payment of costs and charges, must be entered instead of it.

REVERSAL AND DECREE ACCORDINGLY.

The Teresita.

(5 Wallace, 180) 1866.

1. A neutral vessel, at anchor, completely laden with a neutral cargo, on the neutral side of a river dividing neutral from hostile water, washing a blockaded coast, was captured as being subject to just suspicion of an intent to break the blockade.
2. The captain of the vessel (who was, however, absent at the time of capture), and the mate, being examined *in preparatorio*, testified that she was in neutral waters when captured. A stevedore, yet on board, that she had drifted to the place where she was taken, under stress of weather; he not knowing whether when captured she was in neutral waters or not. p. 181

   Held, that this preliminary testimony warranted restoration.
3. Further proof having been allowed, it appeared that the vessel when captured was a quarter or a half mile within the hostile waters; the mate admitting this fact, but testifying that the vessel had drifted to the spot, its anchor and chain being too light, and he expressing as one reason for not returning to the former anchorage as soon as the wind became fair, that the captain was in port (about 36 miles distant), with the ship's papers, and that he did not like to move the vessel without orders; and, as another, that the ship was fully laden and ready to sail, and had been seen by two blockading men-of-war, which did not disturb her, and that he thought the vessel might safely remain where she was till the captain returned; the mate proposing, also, if not captured, to return at once to the anchorage from which he had drifted. On this,

   Held, that the case for the captors was not improved by the further proof, and that with the restitution costs and expenses to be paid by the captors, was to be decreed.

APPEAL from the District Court of the United States for the Eastern District of Louisiana.

Mr. Ashton, Assistant Attorney-General, for the United States.

Mr. Reverdy Johnson, contra, for the claimant.

[1] See chart, *supra*, p. 1663.—REP.

The CHIEF JUSTICE stated the case and delivered the opinion of the court.

The bark Teresita was captured near the mouth of the Rio Grande, on the 16th of November, 1863, by the United States steamer Granite City. The cargo consisted of one hundred and fifty-eight bales of cotton.

She was brought into New Orleans for adjudication; and, upon hearing, the District Court directed restitution of the vessel and cargo.

There was no question of the neutrality of the ship or her cargo; but it was claimed for the captors that she was in Texan waters when captured, and therefore subject to just suspicion of intent to break the blockade.

p. 182 The captain and the mate of the ship, in their preparatory | depositions, testified that she was in Mexican waters; but the captain being on shore at the time, could not be certainly informed as to this. A stevedore, who had been employed on board the vessel and had not been discharged, testified that she had drifted to the place where she was taken, under stress of weather. He did not know whether she was then in Texan or American waters. Her full cargo had been taken in at her former anchorage.

The preliminary hearing took place on this evidence, which, doubtless, warranted restitution.

Further proof, however, was allowed. It consisted of depositions by the captain and some other officers of the Granite City to the effect that the Teresita when captured was a quarter or half a mile north of the line, according to the bearings by the compass, and that the mate admitted that she was in Texan waters. But the same deposition showed that the mate declared that his vessel had drifted to the spot, his anchor and chain being too light; and assigned, as one reason for not returning to the former anchorage as soon as the wind became fair, that the captain was at Matamoras with the ship's papers, and he did not like to move the vessel without orders; and, as another, that the ship was fully laden and ready to sail, and had been seen by two American men-of-war, which did not disturb her, and he thought, therefore, that she might safely remain where she was till the captain returned. It appeared, also, that the mate proposed if not captured, to return at once to the anchorage from which he had drifted.

We are of opinion that, under such circumstances, temporary anchorage in waters occupied by the blockading vessels, does not justify capture, in the absence of other grounds. The case for the captors was not improved by the further proof. The decree of restitution must be affirmed, and we shall direct the costs and expenses to be paid by the captors.

DECREE AND DIRECTION ACCORDINGLY.

The Jenny.

(5 Wallace, 183) 1866.

1. A vessel sailing through blockaded waters may be properly seized on suspicion of intent to break the blockade, when, in addition to the manifest bearing date as of a day when only a part of the cargo is laden, the bills of health and clearance point to one port as her port of destination, while the captain's letter of instructions require him to stop at another not in the direct line to that place, for instructions; when both the vessel's bills of health specify six men and no passengers, there being, in fact, one passenger; when the provisional certificate of registry represents as sole owner one person, and other papers another.
2. Condemnation decreed where a vessel, with a changed name and with papers open to suspicion, as above stated, and whose master had ten months before commanded a blockade-runner, was found sailing from the immediate proximity of the line separating neutral from blockaded waters (in fact from within the line), with an ownership which a complicated, obscure, and apparently contradictory history, left in doubt, where also the ostensible ownership was apparently but a mere cover; no claim for her being put in after capture and libel otherwise than by her captain, who put it in for the ostensible owners; he acting without instructions from them and only in his capacity of master; a part of the cargo being, moreover, more plainly still, enemy's property.
3. In proceedings in libel against a ship and cargo as prize of war, the burden of proving neutral ownership of them is upon the claimants. When there is no proof of such ownership, and still more when the weight of the evidence is that the ownership is enemy ownership, condemnation will be pronounced.

APPEALS from the District Court of the United States for the Eastern District of Louisiana, decreeing restitution of the schooner Jenny and cargo, and decreeing costs and charges against their claimants; the questions involved being of fact chiefly.

Mr. Ashton, Assistant Attorney-General, for the United States; Mr. Marvin, contra.

The CHIEF JUSTICE delivered the opinion of the court; in which the case is stated.

The schooner Jenny, with a cargo of one hundred and fifty-four bales of cotton, was captured by the United States war steamer Virginia, in Texan waters, north of the Rio | Grande, on the 6th of October, 1863, p. 184
and was brought into New Orleans.

She was libelled as prize of war in the District Court for the Eastern District of Louisiana on the 16th of October.

On the 7th of November John Johnson, the master of the schooner, put in four separate claims: one in behalf of Hale & Co., for the schooner; one in behalf of H. Fernstein, for forty-four bales of cotton; one in behalf of Ruprecht & Fortner, for thirty-nine bales, and one in behalf of J. Rosenfeld, for seventy-one bales. On the 10th of December two other claims were filed: one by Charles Andre, in behalf of Augustine Stark, for the thirty-nine bales, and the other by Conrad Seiler, in behalf

of R. M. Elkes, for the forty-four bales. No personal claim or test-affidavit was made by any of the parties alleged to have title in the vessel or cargo; and no evidence was put in of any authority in Andre or Seiler to represent Stark or Elkes. The authority of Johnson was derived from his character as master.

The seizure was made because she sailed from the blockaded coast of Texas, and because of the unsatisfactory nature of her papers.

Her manifest was dated September 17, 1863, at which time her log-book showed that she had only part of her cargo on board; it appeared also from her manifest, her bill of health from the American consul, and her Mexican clearance, that she was bound for New York, whereas the captain's letter of instruction required her to stop at Nassau and conform to the instructions of Saunders & Co., of that place; both her bills of health specified six men, and no passengers, whereas, in fact, a passenger by the name of Mund was found on board; the provisional certificate of registry represented Hale & Co., of Matamoras, as sole owners of the vessel, whereas the captain's instructions and other papers showed that C. F. Jenny was the owner.

These facts, doubtless, justified suspicion and warranted seizure. We must then inquire into the true character and ownership of the
p. 185 vessel and cargo, as shown by the preparatory evidence. |

It appears that the vessel was American built, and that her original name was Southron; and a paper found on board showed that Johnson, her master, had commanded in December, 1862, a schooner engaged in running the blockade from Mobile to Havana.

The Southron was sold under order of the United States sequestration commission in New Orleans to one P. A. Fronty, and a register was issued to him on the 18th of March, 1863.

She was probably soon after sold by Fronty, though he still remained master, to one Julius Schlickum; for this person, on the 21st of April, made a bill of sale of her at Matamoras, to Hale & Co., of that place.

Hale & Co. do not seem to have taken possession of her; for, on the same day, an irrevocable power of attorney was made by that firm to one Jacob Rosenfeld, of Houston, in Texas, giving him or his substitute absolute control over the management and disposition of the schooner by sale or otherwise.

This paper was not signed by Hale & Co., but was drawn in their name, and signed by one John P. Molony, who, in a declaration of membership in the firm, dated six days later, represented himself as a partner.

These documents were not framed and executed in this irregular way by accident. In a letter to Johnson & Co., at Nassau, Jenny called Hale & Co., 'the pretended owners,' and complained that Molony refused to make out the papers, as he, Jenny, wished, simply remarking

to him, ' You have full and irrevocable power of attorney to do or not to do with the schooner whatever you please. I shall never interfere with you or your acts.'

On the same day that the declaration of ownership was made, a British provisional certificate of registry representing Fronty as master, and Hale & Co. as owners, was issued by the British vice-consul.

On the 12th of September, 1863, Rosenfeld transferred to Charles F. Jenny, of Matamoras, as his substitute, all the powers vested in him by the irrevocable power of attorney. | And on the 17th of the same month p. 186
Jenny made a like transfer to Saunders & Co., of Nassau, as his substitute.

Jenny appears to have exercised control over the vessel much earlier ; for he appointed Johnson in place of Fronty, on the 27th of May ; after which the schooner made a voyage to Havana and back, with Rosenfeld as supercargo.

In all transactions connected with the last voyage, Jenny acted as apparent owner ; while Rosenfeld appeared only as a shipper of cotton. In the letter to Saunders & Co., already quoted, Jenny authorized the sale of the schooner at Nassau, and directed the remittance of the proceeds to his firm in Switzerland. In case sale could not be effected at Nassau, he directed that the power and the papers of the ship should be transferred to Schlesinger & Co., of New York, the consignees there of the vessel and cargo, to whom he also wrote instructing them to sell the schooner, or, if not, to obtain a return cargo for her. In this letter he spoke of the vessel as ' my schooner Jenny.'

This testimony leaves the ownership of the schooner in some doubt. The sale to Hale & Co. was most probably a mere cover. It is clear that, except in obtaining the British provisional registry, they never acted or held themselves out as owners ; nor did they appear personally in this court to make claim for the vessel, or otherwise than through Johnson, who acted without instructions from them, and merely in his capacity as master. And he, in his preparatory deposition, said only, that the Jenny belonged to them, as far as he knew, but he did not know exactly.

Their irrevocable power of attorney to Rosenfeld, vested in him all the powers of owner, and made him owner in effect. After the transfer of the power, Rosenfeld was constantly connected with the schooner as supercargo and shipper of cotton. On the other hand, the conduct of Jenny and his apparently absolute control, indicates ownership of her. He may have acted, and probably did act under some arrangement with Rosenfeld, or they may have been connected in ownership. The former supposition is strengthened by the circumstance that Jenny disappeared from all apparent | connection with her immediately after capture ; p. 187
while Hale & Co., the grantors of the Jenny to Rosenfeld, were brought forward as ostensible owners.

Thus far as to the vessel. We have already referred to the claims for the cargo.

One of the claims was in behalf of Rosenfeld, who was presented in a new character. In the power of attorney executed at Matamoras, he was described as a resident of Texas. In the claim made in New Orleans, he was represented as a resident of that city, absent in Matamoras. The claim in his behalf was for the seventy-one bales. It is remarkable, if he was in fact a resident of New Orleans, that he has never claimed otherwise than through Johnson, and never made any test affidavit at all. The truth, we apprehend is, that he was what the power of attorney declared him to be,—a resident of Texas,—and therefore, at that time, a rebel enemy of the United States.

The remainder of the cargo seems to have been shipped in good faith at Matamoras.

We are next to inquire what was the course, position, and conduct of the vessel at the time of capture, as shown by the preparatory evidence and the further proof.

She had recently come down the Rio Grande from Matamoras. She was observed two days before the capture anchored in Texan waters, near the coast of Texas.[1] She was probably there when she took on board the seventy-one bales belonging to Rosenfeld, which she received from lighters. When she left her anchorage, the Virginia sent a boat to intercept her, and she was brought to by a shot or two from this boat. The mate of the Jenny says she was at this time about a mile from the shore. The officers of the Virginia make her distance from shore three miles or more, and her place from three to five miles north of the Rio Grande.

What are the conclusions of law from these facts? In strictness the
p. 188 Jenny, having taken on part of her cargo off | the blockaded coast and having sailed from that coast, was attempting to run the blockade when captured.

But we are not inclined to condemn the vessel on this ground, much less the forty-four bales and the thirty-nine bales, which were taken on board at Matamoras.

But it is an undoubted principle that in a case of libel as prize of war, the burden of proving the neutral ownership of the ship and cargo is upon the claimants. In this case satisfactory proof is made of neutral ownership in the cotton laden at Matamoras. But there is no proof at all of such ownership in the seventy-one bales put on board from lighters; and no satisfactory proof of such ownership in the schooner. On the contrary, the weight of the evidence is that these bales were owned by a rebel enemy; and that the same rebel enemy, either alone or in association with Jenny, who makes no claim, owned the schooner.

[1] See chart, *supra*, p. 1663.—Rep.

It results that the forty-four bales and the thirty-nine bales must be restored to the claimants represented by the master, without contribution to costs or expenses, and that the seventy-one bales and the schooner must be condemned.

The decree below must be reversed and a decree entered |
IN CONFORMITY WITH THIS OPINION.

The Gray Jacket.

(5 Wallace, 342) 1866.

1. The proclamation of President Lincoln made December 8th, 1863, granting to all persons (with certain exceptions) who had participated in the then existing rebellion, a full pardon, with restoration of all rights of property except in slaves and in property cases, where rights of third persons shall have intervened, has no application to cases of maritime capture, and therefore does not extinguish the liability of a vessel and cargo seized *flagrante delicto*, while running the blockade then declared against our southern coast, from the consequences of condemnation by a prize court.
2. A claimant's own affidavit that he is not within the exceptions of the proclamation, is insufficient to establish the fact in setting up the proclamation as an extinguishment of the liability above described.
3. A remission by the Secretary of the Treasury under the act of July 13th, 1861, providing (§ 5) that all goods, &c., coming from a State declared to be in insurrection 'into the other parts of the United States,' by land or water, shall, together with the vessel conveying the same, be forfeited to the United States; and also (§ 6) any vessel belonging in whole or in part to any citizen or inhabitant of such State, 'found at sea;' but enacting also (§ 8) that the forfeitures and penalties incurred by virtue of the act may be mitigated or remitted in pursuance of the authority vested in the said Secretary by an act approved 3d March, 1797, or in cases where special circumstances may seem to require it, &c., does not reach a case where the vessel and cargo were not proceeding to a loyal State.
4. The statute does not give the Secretary power to remit in any case of property captured as maritime prize of war.
5. The liability of property, the product of an enemy country, and coming from it during war, is irrespective of the *status domicilii*, guilt or innocence of the owner. If it come from enemy territory, it bears the impress of enemy property. If it belong to a loyal citizen of the country of the captors, it is nevertheless as much liable to condemnation as if owned by a citizen or subject of the hostile country or by the hostile government itself. The only qualification of these rules is, that where, upon the breaking out of hostilities or as soon after as possible, the owner escapes with such property as he can take with him, or in good faith thus early removes his property, with the view of putting it beyond the dominion of the hostile power, the property in such cases is exempt from the liability which would otherwise attend it.
6. Where the war (a civil war) broke out in April, 1861, a removal on the 30th December, 1863, said to be too late.
7. An order for further proof in prize cases is always made with extreme | caution, p. 343
and only where the ends of justice clearly require it. A claimant forfeits the right to ask it, by any guilty concealments previously made in the case.

APPEAL from the District Court of the United States for the Eastern District of Louisiana, the case being thus:

The steamer Gray Jacket, and her cargo, consisting of 513 bales of cotton, 25 barrels of rosin, some turpentine and tobacco, were captured during the late rebellion, by the United States war vessel Kennebec, on the morning of 31st December, 1863, *on the high seas*, about forty miles south of Mobile Bay and beyond the limits of the blockade then established of that port, by the Federal government. The steamer had gone out of Mobile Bay on the previous night in the dark, and endeavoring, as the captors alleged, to escape, was pursued and on the next morning captured by the Kennebec for breach of blockade. She was, at this time, in a disabled condition owing to a storm in the night, and on the firing of a gun across her bows hove to, without resistance, and without having changed her course.

Being sent into New Orleans for adjudication, her captain (one Meaher), who owned her; the mate, named Flynn, and her chief engineer, were examined *in preparatorio, on the standing interrogatories*. These were all the witnesses thus examined.

In reply to these interrogatories, Meaher, the captain, stated that he was born in Maine, but had lived thirty years in Mobile. 'I am a a citizen,' he continued, 'of the *State of Alabama, to which I owe my allegiance.*' He stated that the vessel came out of harbor with the American flag flying; that he was owner of the vessel and *of the cargo;* 'that the voyage began at Mobile, and was to have ended at Havana'; that in case the vessel had arrived there, he thought that he should have reshipped the cargo to some place where he could have received a better price for it than he could in Havana.

Flynn, the mate, examined after Meaher had been, made the same statement as to the destination of the vessel and cargo. He stated,
p. 344 however, that the vessel sailed 'under | English colors and had no other.' As to their ownership, he said:

> 'The owners of the vessel were Captain Meaher and *brother*. They also owned *half* the cargo. *The balance was for Confederate government account.* The greatest part of the cotton was produced upon Meaher's lands. I understood they had built the Gray Jacket expressly to carry their own cotton to Havana, but they had to allow the government an interest of one-half; otherwise they would not have been permitted to leave Mobile. The Gray Jacket on the trip in which she was taken had attempted to sail covertly from the port of Mobile, then under blockade. She could not have left it otherwise than secretly.'

The cotton, it appeared, was the product of Alabama.

The depositions in which these statements were made, were taken on the 26th of February, 1864. About a month afterwards, Meaher

filed what he called a 'claim, and *answer* to the libel.' It presented a narrative in its material parts, as follows :

'That he, the said Timothy, is the true and *bonâ fide* owner of the said steamer, and of the cargo thereon, and that no other person is the owner thereof.

'That he was living in Mobile, at the time the rebellion broke out, and that he had resided there for upwards of thirty years prior thereto ; that after the breaking out of the said rebellion he gave no aid to the same ; that he had previously, by a life of industry and economy, and the prosecution of legitimate business, acquired a large amount of property ; that after the breaking out of the rebellion he became anxious to adopt some measure by which he might be able to withdraw the same to a place of security ; that with that object he built the said steamer with his own means, and loaded her with the goods constituting her cargo, and then procured a clearance from the so-called Confederate authorities, exercising all the powers of a government *de facto* in Mobile, State of Alabama, from the said port of Mobile to the port of Havana, in the island of Cuba, then and now a port of a country in amity with the United States, as the only means by which he could be enabled to effect the withdrawal of his property from the limits of the so-called Confederacy. |

'And he now avers the truth to be that his right of property in the p. 345
said steamer and in her *cargo*, which was *full and complete while the same were in the port of Mobile*, continued to be full and complete after he had gotten upon the high seas with the intent of escaping from the power and control of the States in rebellion to a port in a country in amity with the United States, and that the said steamer and cargo were not at any time after their escape from the said port of Mobile, rightfully subject to capture, &c.

'And further answering, he says that the President by a proclamation dated the 8th December, A. D. 1863, declared to all persons who had participated in the existing rebellion except as thereinafter excepted, that a full pardon is granted to them and each of them, with restoration of all rights of property except as to slaves and *in property cases where rights of third parties shall have intervened*, upon the condition that every such person shall take and subscribe an oath, as prescribed in the said proclamation, and shall thenceforward keep and maintain said oath inviolate ; that he, the defendant, is not embraced in the exceptions made by the said proclamation ; that on the 18th day of March, 1864, he took and subscribed the oath, as prescribed. That in the premises a full pardon is extended to him, even if he had directly or by implication participated in the existing rebellion, and that he therefore now pleads the pardon as a bar to any further proceedings.'

On a subsequent day the court, on motion of the District Attorney of the United States, ordered so much of the claim and answer as was in the nature of an answer to be striken from the record. The captors then offered in evidence the proofs *in preparatorio* and a paper found on board the captured vessel, as follows :

'*Memo. of agreements made between Messrs. Meaher & Bro., owners of the st'r Gray Jacket, and Henry Meyers, major and ch'f ord. officer, acting for the gover't of the C. S.:*

'The gover't will furnish the whole cargo of cotton, and will make over to the owners of the vessel one-half of the cotton, in consideration of which the owners do agree to deliver the other half, belonging to the
p. 346 government, at Havana, free of | further charge, except the one-half of the expenses of compressing and storing incurred at Mobile.

'It is understood and agreed that the said steamer is to return to Mobile, if practicable; if not, then to some other confederate port; and the gover't is to be allowed at least one-half of the carrying capacity of the steamer in the return voyage, at a freight of £25 per ton, and for any excess over the one-half required by the gover't, at £30 per ton, payable in cotton, at the rate of 6*d.* per pound for middling, and other grades in proportion, on delivery of the freight.

'It is further understood and agreed that in the event of a partial loss of the outward cargo, the portion of cotton saved is to be equally divided between the parties at the port of destination, and any loss on the inward cargo is to be settled on the principle of general average, as far as the cargo is concerned.

'HENRY MEYERS,
Major and Ch'f Ord. Officer, Dep't of the Gulf.

'MOBILE, Oct. 22, '63.'

On the other side, the claimant put in evidence the oath referred to in his claim and answer. It was an oath of loyalty, promising thereafter faithfully to support the Constitution of the United States, &c., being an oath prescribed in the proclamation of President Lincoln of December 8th, 1863, referred to in the answer, and by which the said President, reciting that it was desired by some persons heretofore engaged in rebellion, to resume their allegiance to the United States, 'proclaimed and made known to all persons who had directly, or by implication, participated in the existing rebellion, except as hereinafter excepted, that a full pardon is granted to them, and each of them, with restoration of all rights of property, except as to slaves, and *in property cases where rights of third parties shall have intervened*, and upon the condition that every such person shall take and subscribe an oath,' &c. Certain classes of persons were excepted. After the giving of this oath in evidence the claimant moved for an order to take further proof. The matter was held open.

p. 347 All these proceedings, including the giving in evidence | of the paper above-named found on board, took place 5th April, 1864. On the 25th May following, the claimant made a new affidavit, which was subsequently filed. It presented a narrative as follows:

'That he, the said Timothy, is a loyal citizen of the United States, born in the State of Maine; that he was late of the city of Mobile, in the State of Alabama, and that he is the true, lawful, and sole owner of

the steamer Gray Jacket, and of the cotton constituting her cargo; that he was living in the city of Mobile at the time the existing rebellion broke out, and that he had resided there upwards of thirty years prior thereto; that during the period which preceded the breaking out of the rebellion he opposed secession and did all in his power to prevent the same, and to preserve and maintain the Union; and that after the said rebellion broke out he gave it no aid or assistance in any way whatever.

'And he further says: that after the breaking out of the rebellion he was anxious to adopt some course by which he might be enabled to withdraw the property he was in possession of, or as considerable a portion of it as was practicable, from the so-called Confederate States, to a place of security, and get it into such a position that he might realize the value of it and return to the State of Maine, where his mother now lives and where he has property and many relations and friends; that with this object and intention, well known to several of his confidential friends, he built the said steamer Gray Jacket with his own means, with the design of lading her with cotton belonging to himself; that while he was engaged in building said steamer, and she was approaching completion, the Confederate authorities at Mobile manifested a determination to make use of the steamer to advance their own purposes, and proposed to load her with cotton furnished by them and to give him one-half of the cargo as the owner of the steamer, on condition that the other half was landed at Havana, free of charge for freight, and that he would bind himself to return to Mobile or to some other Confederate port, and give to the so-called Confederate government a certain portion of the carrying capacity of the said steamer on certain terms and conditions; that situated as he was, with his property and himself and his family in the power and under the control of the rebel authorities, he had no freedom | of action, and could only by his manner manifest his p. 348
repugnance to any proposal without venturing on an absolute refusal to it; that he did manifest great dissatisfaction to the proposed arrangement, and that no such contract was entered into by him with the rebel authorities, and that no such arrangement by them with him was carried into effect, either wholly or in part; that although the said rebel authorities had seemed to abandon the attempt of carrying out the said proposal, not having found any cotton to be laded aboard of the said steamer, yet he found that when he was ready to begin to lade his own cotton aboard of her that the said rebel authorities had not abandoned all idea of deriving an advantage from exercising a forced control over his property.

'That an officer exercising authority at Mobile visited him and said that he, Meaher, could not take the cargo out unless he consented that one-half of the cargo to be put on board of the steamer should be for the account of the so-called Confederate government, and that if he, Meaher, did not comply, he, the officer, would take possession of the steamer and put a government crew on board of her; that he, Meaher, finding that it was impossible for him to have any control over his property if he refused to comply with the requisition on the part of one armed with physical power to despoil him altogether, *apparently submitted to and complied with the requisition, with the secret determination to assert and maintain his real rights over the entire cargo so soon as he had escaped beyond the authority and control of the rebel States;* that all the cotton laden on said steamer at the time of beginning her voyage, and found

on board of her at the time of her capture, was his own property, and had been produced on his own plantation, or had been bought and paid for by him, with a view to its being laded on board of said steamer for transportation to Havana on the contemplated voyage, on his own account, and that before he obtained a clearance of the said steamer Gray Jacket and her cargo, he was required to pay and did pay the export duty imposed on all cotton exported, by authority of an act of the Congress of the so-called Confederacy, upon the entire amount of cargo embarked on the said steamer.

'That neither the so-called Confederate States, or any person or persons in rebellion against the United States, or their factors, or agents, or any others, had at the time of the shipment of the said cotton on the
p. 349 said steamer Gray Jacket, or at the | time of the capture of the said steamer, on the 31st day of December, 1863, or now have any right, title, or interest in the said cotton or in the said steamer Gray Jacket.

'That it was at first his intention to have taken his wife and children with him on board the said steamer on the said proposed voyage to Havana, but that he was afterwards deterred from attempting to do so lest it should strengthen the suspicion which already existed against him in the minds of the rebel authorities, and prevent his getting away at all, and that he at last unwillingly abandoned the idea and left them after *having made an arrangement with his brother, J. M. Meaher, to send them as soon afterwards as he could find a suitable opportunity, to Havana, where they were to place themselves under the care of the commercial house of Santa Maria, with whom he, Timothy Meaher, was to have made an arrangement.*

'That after lading the steamer, he procured a clearance from the so-called Confederate authorities, exercising all the powers of a government *de facto* in the said city of Mobile, in the State of Alabama, from the port of Mobile to the port of Havana, as the only means by which he could be enabled to effect the withdrawal of his said steamer with its cargo from the limits of the so-called Confederacy and beyond the powers and control of the States in rebellion against the government of the United States. And he further says that the President of the United States, by a proclamation, dated the 8th day of December, 1863, declared,' &c. [setting forth the proclamation and pardon, as in the former affidavit on pp. 344–5.]

The court condemned the vessel and cargo.

The case being now in this court, Mr. B. F. Butler, in behalf of the claimant Meaher, moved for an order to take further proof; its purpose being, in effect, to establish the truth of the facts set forth in the second affidavit of the claimant; to show also in substance—

'That he sailed out past Fort Morgan, in the evening of the 30th of December, with the full intent to deliver himself up to the blockading squadron, if he met it, or, failing to so do, to go to Havana; that during the night his vessel was partially disabled, bursting a steam pipe, but
p. 350 he refused to return to Mobile, | although, owing to the storm, he had difficulty in keeping off shore, and was obliged to make all the offing he could.

'That, seeing the Kennebec, he did not alter his course or attempt

to get away from her, although he might have run ten knots, his machinery being repaired, but kept at the rate of four knots till the Kennebec came up.

'That he was sailing under the American flag hoisted on his vessel, being the only one he had on board, and one which he had preserved through the war, at the hazard of his life or liberty, before he was captured.

'That when boarded he told the officer why his vessel was in this predicament, and demanded protection for himself and property, but was *seized as prize*.

'That he answered the interrogatories put to him without any knowledge of the object, and before he had any opportunity to make any explanations or statements in his own behalf.

'That as soon as he was permitted, to wit, on the 18th of March, 1864, he went before the proper officer and took the oath of amnesty prescribed by the President's proclamation of December 8, 1863, with full intention to keep the same, and has ever kept his oath inviolate; that this was more than a year before the war ended, and would have precluded his return to Mobile while the Confederacy existed.

'That he has proved all these facts to the satisfaction of the Secretary of the Treasury, who has remitted to him all the forfeitures prescribed by the act of Congress of July 13, 1861, and acquitted him of all intention of violating the laws of the United States or of aiding or abetting the rebellion.'

Under the form of further proof he desired also to bring before the court the remission by the Secretary of the Treasury above referred to, and made under the act of July 13, 1861.

This act, it is necessary to state, declares (§ 6) that any vessel belonging, in whole or in part, to any citizen or inhabitant of a State whose inhabitants were declared to be in a state of insurrection [as those of Alabama had been declared], 'found at sea,' should be forfeited to the United States; and also, by another section (§ 5), 'all goods and chattels, wares and merchandise, coming from said State or | section, *into the other parts* p. 351
of the United States, . . . by land or water, together with the vessel or vehicle conveying the same.'

The act, however, declared (§ 8) that the forfeitures incurred by virtue of it might be remitted in pursuance of the authority vested in the Secretary of the Treasury by an act entitled, &c.

The act of remission under the seal of the Secretary, and sought to be put in proof, bore date March 21st, 1866, and ran thus:

'Whereas a petition has been made before me by Timothy Meaher, a citizen of the State of Alabama, for the remission of the forfeiture of the steamer Gray Jacket, and her tackle and cargo, incurred under the statute of the United States entitled, &c., approved July 13, 1861;

'And . . . it appearing to my satisfaction that the said forfeiture was incurred without any intent on the part of the petitioner to violate the laws of the United States, or to aid or abet the insurrection against the government of the United States, and that the petitioner is a loyal

citizen, and that said steamer and cargo were condemned by the United States District Court for the Eastern District of Louisiana as prize of war:

'Now therefore know ye, that I, the Secretary of the Treasury, in consideration of the premises, and by virtue of the power and authority to me given by the said eighth section of the said act of July 13, 1861, do hereby decide to remit to the petitioner all the right, claim, and demand of the United States to the said forfeiture, upon payment, &c., *so far as such forfeiture was incurred under the provisions of the act of July* 13, 1861, *but not otherwise.*' [1]

It appeared that as originally drawn, Meaher's petition to the Secretary of the Treasury recited in the foregoing act of remission, set forth that Meaher 'would satisfy the honorable Secretary of the Treasury that he was a loyal man, attempting to escape from the Confederacy, which he had never aided with his property [*and to take the same into the*
p. 352 *loyal States, by* | *way of Havana, if his vessel should prove fit for the voyage*], in order to meet his wife and family, whom he had sent out of the Confederacy by another channel, and for whom he had arranged to live at the house of his mother, in the State of Maine;' that the petition thus drawn, and without the words in italics and brackets, was filed and submitted by the Secretary of the Treasury to the Attorney-General, who objected to it, to that officer, 'that it contained no allegation so as to bring it within the act of July 13, 1861, that the cargo was proceeding, when captured, from a revolted State *into other parts of the United States.*' The requisite words, indicated above in the brackets and italics, appeared as an interlineated amendment.

The Court allowed this remission by the Secretary to be received as part of the case; which therefore, as it now stood before this court, presented three questions:

1. How far the judgment should be affected by Meaher's oath of loyalty, in connection with the proclamation of the President giving full pardon and with restoration of all rights of property, except 'in property cases where rights of third parties shall have intervened?'

2. How far it should be affected by the remission now allowed to be read and relied on, from the Secretary of the Treasury?

3. Whether, if it was unchanged by these, the case was one for further proof?

Mr. Ashton, Assistant Attorney-General, for the United States, and Mr. Eames, for the captors:

I. Meaher declares that he was at all times a loyal citizen of the United States, and yet relies on the proclamation of President Lincoln in favor of those 'who have participated in the existing rebellion;' declares that he has ever acted a patriotic part, and then sets up a 'full pardon' for treason.

[1] 12 Stat. at Large, 255.

The proclamation and pardon was never meant for persons such as Meaher describes himself to be.

But for whomever meant, it excepts 'property cases where | the right p. 353
of third parties had intervened.' Here the right of the captors, by the act of seizure, intervened. The case is in terms excepted.

Neither has Meaher proved that he is not within the classes excepted from the benefit of the proclamation. He asserts, indeed, in his *ex parte* affidavit, that he is not; but that is no proof of the fact.

II. The case is no better on the remission from the Treasury. The vessel was not 'found' at sea within one section of the act of July 13, 1861. She was captured when sailing, a flag flying, her officers and crew aboard; nothing derelict about her; seized, not found. Neither were the vessel and cargo coming from a rebellious State or section 'into the other parts of the United States' so as to come within the other section. The voyage was unquestionably to Havana. Going from Mobile to Maine, *via* Havana, the plan finally set up, was plainly all an afterthought.

Besides, the present condemnation was incurred by virtue of the public law of war, and not under the statute of July 13, 1861, and is therefore, by the terms of the warrant, excluded from its operation.

Even if this were not so, the Secretary's power to remit forfeitures incurred by virtue of the statute of 1861 is limited by the words of the statute to cases of seizure and proceedings to enforce forfeitures *under the statute*, and does not extend to and cannot be exercised in cases of maritime captures of vessels and cargoes under the law of war, adjudicated under that law, and in the prize jurisdiction, and then condemned as prize of war on account of breach of blockade.

Recent cases in this court show vessels captured and condemned as prize of war, though at the time of capture, and until so captured, liable also to seizure and forfeiture under the statute of 13th July, 1861, as belonging, in whole or in part, to citizens or inhabitants of the insurrectionary States, and found at sea. Among these, the Baigorry and the Andromeda;[1] the Cornelius and the Bermuda.[2] |

III. *Is the case one for further proof?* p. 354

1. Whatever Meaher's general feelings or views were in regard to the rebellion, there is no doubt, we submit, that this voyage was a speculation, a fraud on the blockade. He was captured on the high seas, outside the line of the blockading vessels, steering to Havana, trying, as the captors report, and, as seems obvious, to escape. If he could bring a host of witnesses to show what he was and what he meant before sailing; that he was then a loyal man, wishing to return to loyal regions and loyal friends, these facts contradict them all, in a way past any power

[1] 2 Wallace, 474, 481.

[2] 3 Id. 214, 553.

of refutal. Why did he not first *seek* the blockading squadron? Indeed, the matters set up in his affidavits seem to have been quite an afterthought. There is nothing even in *his* deposition taken *in preparatorio*, which so much as adumbrates the scheme subsequently set up as the true history. If ever a claimant showed a character and a case where further proof ought *not* to be allowed, it is Meaher. He has shown that he can make proof *ad libitum*. He first gives evidence and files an answer, showing one case, sufficient, as he supposes, for the then necessity. But the mate contradicts him as to ownership, and the government produces the document found on board, which confirms what the mate had declared. He then files a second affidavit, setting up a further case, and explaining away the evidence against him. He next petitions the Secretary of the Treasury, setting forth his case as he thought needful. Objection is made by the Attorney-General that his case is radically defective in its facts, the non-existing facts being pointed out. And lo! Meaher immediately interlines and states the required facts. Allowance for further proof in such a case would be a direct encouragement to perjury. Courts of admiralty are most careful not to lay snares in this way for defective consciences.

We may, moreover, well doubt whether Meaher was an honest or a loyal man at all. He confesses that he meant to cheat the Confederacy for his own benefit, not for the nation's. And why does he state that his
p. 355 allegiance was due | to the State of Alabama? Did he not know that Alabama was then in rebellion against the nation? But—

2. If he were ever so loyal, and if his narrative, in its last elaborated and interlineated form, were true, it would be no defence:

(*a*) The law of war denounces, as being a trading with the enemy, the withdrawal by a citizen of this country of any property without license, from the enemies' territory after a considerable time has elapsed since the beginning of hostilities.[1] In that case, this court held that goods purchased in England before hostilities, and shipped to the purchaser in this country by his agent, eleven months after the declaration of war, were confiscable in a prize court.

(*b*) In Meaher's affidavits his purpose of removing this property '*to a place of security*, beyond the power and control of the States in rebellion,' is presented in such a way as that an intention to return to his residence and business in Mobile is consistent with it; nor are there any facts alleged in that document tending to show a dissolution of the commercial establishment and domicil in Mobile (proved by Flynn's deposition *in preparatorio* to have existed), prior to or at the time of his sailing on this voyage, or any suspension of the mercantile pursuits in which he had been engaged during the entire period of war. If the

[1] Penniman's claim. The St. Lawrence, 9 Cranch, 121.

claimant was a member of a house of trade in Mobile, engaged in the enemy's commerce, then, independently of personal residence, a continued connection with such a house would operate in law to prevent any divestiture of that enemy quality impressed upon him by residence and commerce during the war in Alabama.

(*c*) Meaher alleges that this cotton, 'had been produced on his own plantation.' Now, no doctrine is better settled than that the produce of a person's own plantation in the enemy's country is considered, in a prize court, as the property of the enemy, independent of his own personal residence and occupation.

Every way the case is against the claimant. |

Mr. B. F. Butler, for the claimant: Mr. C. Cushing, being allowed p. 356
leave to appear for the Treasury department:

I. *The proclamation of December 8th,* 1863, was a proclaimed license to every sort of enemy within its terms, *those by construction* as well as those in fact, those who by mere presence and necessity had participated in the rebellion as well as to those who were actual belligerents, to come within the Union lines, with full restoration of all rights and property.[1]

No '*right* of third parties'—neither *jus ad rem* nor *jus in re*—had 'intervened' by a simple seizure; nor could any intervene, at best, before a decree of condemnation. The case was not 'a property case.' Even if 'a right' had intervened it was initiate only, and defeasible by the party's taking the oath of loyalty as soon as he could and, certainly, before decree should fix the right.

Indeed the government has power to release all penalties and forfeitures and all maritime captures, irrespective of the claims of captors or informers, up to the moment of distribution of proceeds. Such is the settled doctrine of the prize courts.[2]

II. *The remission by the Secretary of the Treasury.*

1. The vessel was 'found at sea' and the property of an inhabitant of an insurgent State. When found, *eo instanti*, by force of the statute she became forfeited to the United States, and the title of the United States could not be divested either by capture or by sale to an innocent purchaser.[3] There is no indication of the acts referring to derelict or abandoned vessels only. The *vessel* then comes within the terms of the act.

But the cargo must go with the vessel and partake of its character, especially where there is the same owner to both.

The remission is a license coupled with a final adjudication | of the p. 357

[1] The Herstelder, 1 Robinson, 117.
[2] The Elsebe, 5 Robinson, 172; H. M. S. Thetis, 3 Haggard, 231; French Guiana, 2 Dodson, 156–158; The Diligentia, 1 Id. 404; The Nassau, Blatchford's Prize Cases, 601; Fifty-two Bales of Cotton, Id. 310.
[3] United States *v.* 1960 Bags of Coffee, 8 Cranch, 398; Same *v.* Grundy, 3 Id. 351.

bona fides of the licensee in his acts under it, and must relate back to the inception of the voyage.

All licenses, either express or implied, are to be construed with the greatest liberality.[1] Such is the present doctrine, though not the old one.

2. This is a case of Treasury forfeiture, and not of maritime prize.[2]

This power of making remissions has been exercised by every Secretary of the Treasury since the war. In the Florida, by Secretary Chase; in the Cyclops, by Secretary Fessenden; in the case at bar, by Secretary McCulloch.

In the Revolution of 1775 the British Parliament passed an act of non-intercourse and forfeiture of rebel property, from which the act of July 13th, 1861, was drawn, and its necessity was argued from the same consideration as in this rebellion.[3]

The British act contained no relief from forfeitures under it, so that there was the strongest disposition to hold the captures maritime prizes; yet in every instance the forfeitures were adjudged to the Exchequer and not to captors, or as 'Droits of Admiralty,' save in the first case arising;[4] and in that case, the judge, Sir George Hay, publicly declared that he repented of that decision.[5] Ever after the decisions were made as forfeitures. We have caused the 'Paper books of the Appeals to the Lords' to be examined, and find all cases were brought on the Instance side of the court, although the act denominates the property as that of 'open enemies,' and to be proceeded against '*as lawful prize.*'

The blockade, which was declared by proclamation of April 19, 1861, is a *pacific*, and not a *belligerent*, blockade. It is made so in terms: |

p. 358 'To the protection of the public peace, and the lives and property of quiet and orderly citizens pursuing their lawful occupations, until Congress shall have assembled and deliberated on the said unlawful proceedings, or until the same shall have ceased, have further deemed it advisable to set on foot a blockade of the ports within the States aforesaid, in pursuance of the laws of the United States, and of the law of nations in such case provided.'

The blockade was made specifically 'under the laws of the *United States* and the laws of nations.' A *belligerent* blockade could have been only under the laws of nations, *jure belli*, in such case provided.

Congress did deliberate thereon, and the act of July 13, 1861 (already quoted), was one result of these deliberations, with authority to the

[1] The Jonge Klassina, 5 Robinson, 265; The Clio, 6 Id. 67; The Eolus, 1 Dodson, 300; Duer on Insurance, 595.

[2] See on this subject generally the opinion of Treat, J., of the Eastern District of Missouri, 8vo. pp. 78; Washington, Treasury Department, 1866.

[3] See letter of Mr. Secretary Chase explanatory of act of 1861, Cong. Globe, 37th Cong., 1st sess., p. 55.

[4] The Dickenson, Marriot's Decisions, page 1.

[5] Marriot, 74, 197, 222.

President to make a new proclamation on the subject of commercial intercourse with the rebellious States.[1]

A proclamation was issued August 16, 1861, reciting the act of July 13, and declaring, among other things, that 'all ships and vessels belonging in whole or in part to any citizen or inhabitant of any of said States, found at sea, &c., will be forfeited to the United States.' It proceeded:

'And *I hereby enjoin upon all district attorneys, marshals, and officers of the revenue, and of the military and naval forces of the United States,* to be vigilant in the execution of *said act,* and in the enforcement of the penalties and forfeitures imposed or declared by it; leaving any party who may think himself aggrieved thereby to his application to the Secretary of the Treasury for the remission of any penalty or forfeiture, which the said Secretary is *authorized* by law to grant, if, in his judgment, the special circumstances of any case shall require such remission.'

From notification of that proclamation the blockading fleet became, by the authority of Congress and by order of the President, employed on the revenue service, so far as the acts of trade of the insurgents were concerned, and | a 'blockading force' *quoad* neutral or hostile nations; p. 359
the rights and wrongs of the rebels to be adjudged by the municipal laws of their country, which alone were applicable to them, and the neutral or hostile offenders to be tried by the prize courts of the country under the law of nations, to which alone they were amenable. This course was taken by Congress in order to meet meritorious cases like that at bar, instead of leaving the citizen to the rigors of blockade and prize capture; 'and when hardships shall arise provision is made by law for affording relief under authority much more competent to deal in such cases than this court ever can be.'[2]

The Executive has ordered 'all military and naval officers, district attorneys, and marshals, to be vigilant in enforcing that act.' Can a naval officer and a district attorney, by colluding to bring the cause on the prize side instead of the instance side of a United States Admiralty Court, thus avoiding their proclaimed duty, oust the United States of its forfeiture and property, and involve it perhaps in serious inconvenience?

On this whole subject Sir William Scott speaks with force and clearness in *The Elsebe:*[3]

'Prize is altogether a creature of the crown. No man has, or can have, any interest but what he takes as the mere gift of the crown. Beyond the extent of that gift he has nothing. This is the principle of law on the subject, founded on the wisest reasons. The right of making war and peace is exclusively in the crown. *The acquisitions of war belong*

[1] 12 Stat. at Large, 257; Id. 319.
[2] Per Johnson, J., 1960 Bags of Coffee, 8 Cranch, 405.
[3] 5 Robinson, 173–192.

to the crown, and the disposal of these acquisitions may be of the utmost importance for the purposes both of war and peace. This is no peculiar doctrine of our constitution; it is universally received as a necessary principle of public jurisprudence by all writers on the subject. *Bello parta cedunt republicæ.*

'And I must add, that though I have suffered a party to stand before the court for the purpose of arguing the question, I do not know
p. 360 the party who can legally stand before it, praying | a condemnation to the crown, which the crown itself publicly renounces.

'When I state the position contended for on the part of the captors to be in effect this, that it shall be in the power of every man who has made a capture,—of the pettiest commander of the pettiest privateer,—to force on, in spite of all the prudence of the crown, opposed to such an attempt, the discussion and decision of the most delicate questions, the discussion and decision of which may involve the country in the most ruinous hostilities, I state a proposition that must awaken the apprehension of every man who hears me as to the extent of the danger which would attend the establishment of such a principle.'

III. *Is the case one for further proof?* Opposing counsel argue that it is now attempted to show a different case from that presented by the proofs *in preparatorio*. This is not so; though we may wish to show a fuller one.

The standing interrogatories are not adapted to reach the facts in all cases of capture, in a war so special as ours. What are these standing interrogatories?

To ascertain the legal *status* of a vessel in relation to her neutrality, a limited number of questions called 'standing interrogatories' were prepared many years ago by Sir William Scott, and have been adopted by the courts of the United States without substantial change. No better illustration of their occasional ill adaptation to elicit the facts necessary to the understanding a capture arising under a rebellion, such as was ours, can be had than the answer they cause Meaher to give in reply to the first interrogatory when the question is not read in connection therewith. On that answer the captors found an argument of disloyalty. The answer which the witness makes is:

'I was born in Maine; I live in Mobile, and have lived there thirty years; I am a citizen of the State of Alabama, to which I *owe my allegiance.*'

The matter is explained when you see to what question the answer is made. It is: |

p. 361 'Where were you born, and where do you now live, and how long have you lived there? Of what prince or *state* are you a subject or citizen, and to which do you owe allegiance?'

So it is with all the proofs *in preparatorio*. They are responsive to specific questions, and are not adapted to get out a history in a case

where a history may well exist. Any exfoliation of the responsive facts —that which would make the history—would, as responsive to these interrogatories, be irregular.

We concede that, in a foreign war and a blockade of a foreign port, where there are no circumstances of license or withdrawal of friendly property to be proved, there would be no such doubtful *status* of the *res* as would allow further proof. But the case, we repeat, is not one of this sort. It is the case of an insurrection by certain people in certain parts of one nation ; a case where many people in the insurrectionary district remained loyal, and wished to leave the district. Certainly a capture here presents a different case from one of an enemy's vessel, and enemy property, of a claimant enemy by domicil in enemy country, pursuing a voyage in the interest of the enemy government.

The few discrepancies in the testimony are easily reconcilable. Meaher testifies that he owns the whole vessel and cargo. Flynn testifies that it belongs to Meaher, that the owners were Meaher & Brother. The explanation is that Meaher knew the fact that he was sole owner, and that Flynn did not know. Meaher knew that he put his own cotton on board, and, although forced to consent to ship half on government account, this did not change the ownership, and it, in fact, was all his own. This he now offers to prove, and has proved, to the satisfaction of the Secretary of the Treasury.

So as to the paper found on board.

The document is not signed by the claimant, and therefore ought not to affect him unless it is shown that he agreed to it. It is an offer by the Confederate government to furnish the whole cargo on joint account with Meaher Brothers, upon certain conditions. This was under date of October | 22d, 1863, more than two months before the p. 362
voyage, while the vessel was fitting out. That this contract was not accepted nor acted on is shown by Flynn :

'I understood they built this vessel expressly to carry their own cotton to Havana, but they had to allow government an interest of one-half in the cargo, otherwise they would not have been permitted to leave. Meaher had necessarily to *appear* to accept it.'

The claimant makes no contradictory cases. The facts which he seeks to prove are only those which he set forth in his claim and answer, explained, and by proper filling up, enlarged. No one of them is contradictory to anything he testified to in his deposition *in preparatorio*.

IV. *Is the history, if it were in proof, no defence?* We submit, in opposition to the captor's counsel, that it is :

(*a*) The right of withdrawal of person and goods by a citizen from hostile territory, has always been recognized, and applauded as an act of loyalty. The only question has been, what is a *reasonable* time ?

That question must always be decided by the circumstances of each case. Nothing can be deduced from rules in a foreign war, as applicable to this rebellion. The citizen had a right to suppose that his government would put down the rebellion within a reasonable time, so that he would not be obliged to quit home and property, as was hoped by all, and so wait. The Confederacy did not allow their citizens to leave it if the intention so to do was known. All were retained for conscription and taxation. Undeniably, a reasonable time is to be given to collect property, but here the very collection of it tended to lead to suspicion and confiscation. The war was carried on by the rebels in an unusual and barbarous manner towards persons disposed to be loyal. If this course of the rebels furnishes no reason for relaxation of the rule by the courts, it certainly tends to excuse delays, and accounts for inconsistencies in the conduct of the claimant not to be judged by the rules of foreign warfare.[1] |

p. 363 In the case of *The St. Lawrence,* cited on the other side, although eleven months, under the facts, was considered an unreasonable delay, it being a foreign war, yet the Supreme Court granted motion for further proofs. In the case of a rebellion the rule should be that it is a reasonable time, whenever the *withdrawal is made in good faith ;* an issue to be determined by the facts of each case.

(*b*) The captors assert that ' an intention on the part of the claimant to return to his residence and business in Mobile is consistent with the contents of this affidavit ; and that there are no facts in the affidavit tending to show any dissolution of the claimant's commercial establishment and domicil in Mobile prior to or at the time of his sailing on this voyage, or any suspension of the mercantile pursuits in which he had been engaged during the war.'

But the affidavit does set forth that the claimant desired to ' withdraw the property he was in possession of, or as considerable a portion of it as was practicable, from the so-called Confederate States, to a place of security, and get into such a position that he might realize the value of it and return to the State of Maine, where his mother now lives, and where he has property and many relations and friends ; that with this object and intention, as well known to several of his confidential friends, he built the steamer Gray Jacket with his own means, with the design of lading her with cotton belonging to himself.'

And ' that it was at first his intention to have taken his wife and children with him on board the said steamer, on the said proposed voyage to Havana, but that he was afterwards deterred from attempting to do so lest it should strengthen the suspicion which already existed against him in the minds of the rebel authorities, and prevent his getting away

[1] The Ocean, 5 Robinson, 84.

at all, and that he at last unwillingly abandoned the idea, and left them, after having made an arrangement with his brother, J. M. Meaher, to send them as soon afterwards as he could find a suitable opportunity to Havana, where they were to place themselves under the care of the commercial | house of Santa Maria, with whom he, Timothy Meaher, p. 364
was to have made an arrangement.'

(*c*) *The res is not enemy property.* Being simply domiciled in rebellious territory, without any act shown, does not make a loyal citizen an enemy, within the legal definition of enemy, without some declaratory act by his sovereign; certainly not so as to remit his rights to be tried by the laws of nations in a prize court.[1]

The property of rebels is not confiscable as prize of war, but by forfeiture.[2]

Being, at worst, only an enemy by construction of domicil—a *quasi* enemy—his *status* changed as soon as he formed the intention of returning to his allegiance, and did any act carrying out that intention.[3] He had escaped from the enemy country with his property, and was on the high seas, on his own deck, under the American flag, which he had a right to raise, having protected it through the rebellion. His domicil *eo instante* changed; he was no longer an enemy, even by construction, but an American citizen. His property, being enemy only because of his *status*, partook of the change with him. The flag determined the character of the vessel and cargo in absence of all papers.[4]

The question, in short, is, 'Shall the court be left to grope among inferences, circumstances, misrecollections, or misconceptions of witnesses, to find facts upon which to confiscate a loyal man's property, when, by admitting further proof, the claimant will prove, to the satisfaction of the court, as he has done to one branch of the government, that every answer or allegation that he has made is true, and that he was a loyal citizen, trying to take his property from the grasp of the enemies of the government, who ought to | be aided and protected in so doing, p. 365
and not an alien enemy, whose property is to be condemned under the law of nations?'

Mr. Justice SWAYNE delivered the opinion of the court.

This case comes before us by appeal from the District Court of the United States for the Eastern District of Louisiana.

In the night of the 30th of December, 1863, the steamer Gray Jacket was discovered running out of Mobile Bay by the gunboat Kennebec,

[1] Judge Treat's opinion, p. 24, citing opinions of Nelson and Swayne, JJ.; The Dickenson, Marriot's Decisions, 1–46; The Venus, 8 Cranch, 280, 294, 301.
[2] The William and Grace, Marriot, 76; The Rebecca, Id. 197–210; The Renard, Id. 222–225.
[3] Lawrence's Wheaton, 564–567; The Indian Chief, 3 Robinson, 17–22; The Venus, 8 Cranch, 280.
[4] The Vrow Elizabeth, 5 Robinson, 11.

one of the blockading fleet. The darkness of the night enabled the steamer to avoid the pursuing vessel. In the morning she was seen endeavoring to escape to the southward and eastward. The Kennebec fired a gun across her bows. She hauled down her colors and hove to. The captors took possession of her. Her cargo was found to consist of about five hundred bales of cotton and a few other articles of small value. She was put in charge of a prize crew and sent to New Orleans for adjudication. The claimant, Meaher, was examined *in preparatorio*. He states that he was born in Maine; he had lived thirty years in Mobile; he was a citizen of Alabama, and owed his allegiance to that State; he was captain of the Gray Jacket, and owned the vessel and cargo; the vessel was bound for Havana; he built her near Mobile; the cotton with which she was loaded was raised in Alabama.

Flynn, the mate, was also examined. According to his affidavit, she sailed under English colors; her machinery had broken down, and she was in a disabled condition when captured. He says, 'She was taken running the blockade.' . . . 'The owners of the vessel were Captain Meaher and brother.' . . . 'They also owned half the cargo. The balance was for Confederate government account.' . . . 'I know the Gray Jacket, on the trip on which she was captured, had attempted to sail covertly and secretly from Mobile, then under a blockade. She could not have
p. 366 left otherwise than secretly.' . . . 'J. M. and T. Meaher | owned the vessel and half the cargo. The Confederate government owned the other half.'

Among the papers found on board was an agreement between the claimant and Meyers, a military officer and agent of the rebel government, whereby it was stipulated that 'the government will furnish the whole cargo of cotton, and will make over to the owners of the vessel one-half of the cotton, in consideration of which the owners do agree to deliver the other half belonging to the government at Havana, free of charge, except half of the expenses of pressing and storing incurred at Mobile.'

That 'the said steamer is to return to Mobile, if practicable; if not, then to some other Confederate port; and the government is to be allowed one-half of the carrying capacity of the steamer on the return voyage,' at rates specified.

And that 'in the event of a partial loss of the outward cargo, the portion of cotton saved is to be equally divided between the parties at the port of destination; and any loss on the inward cargo to be settled on the principle of general average, so far as the cargo is concerned.' Meaher's affidavit *in preparatorio* was taken on the 26th of February, 1864. It ignored the interest of his brother in the vessel and cargo, and alleged the property of both to be in himself. It concealed the ownership of half the cargo by the rebel government and the contract between him

and the rebel military agent. Upon these subjects not a word was uttered. On the 21st of March he filed an answer and claim, which do not differ materially from his affidavit *in preparatorio.*

The court ordered the paper to be stricken from the files, but gave him leave to file an affidavit, which was accordingly done on the 29th of August following. This affidavit sets up an entirely new state of facts. According to its averments, he never sympathized with nor gave any aid to the rebellion; the steamer was built to enable him to get away with as much as possible of his property; he did not take his family with him, lest it might excite suspicion and defeat his object; the rebel government furnished none of the cotton | with which his vessel p. 367
was laden; he was compelled to agree that one-half of it should be taken on account of that government, and also to assent to the provisions of the contract with the rebel military agent; otherwise, he would not have been allowed to depart; it was his intention, upon reaching Havana, to claim all the cotton as his property, and to appropriate the proceeds entirely to himself; on the 18th of March, 1864, he took the oath prescribed by the President's proclamation of the 8th of December, 1863; he is not within any of its exceptions, and is entitled, by its provisions, to the restoration of the property.

The court below condemned the vessel and cargo as prize of war, and the decree is before us for review.

In this court a motion was made at the hearing, and argued at length, for an order for further proof, to enable the claimant to establish the facts set forth in the affidavit as to his loyalty to the United States, and the motives and object of his departure from Mobile with the vessel and cargo, and also to enable him to bring before this court the remission by the Secretary of the Treasury, bearing date of the 26th of March, 1866, of all right and claim to the property as forfeited to the United States, 'so far as such forfeiture was incurred under the provisions of the act of July 13, 1861, and not otherwise.'

The court consented at once to receive this paper without further proof, and it is properly in the case.

The questions for our consideration are:

The effect of the amnesty proclamation of the 8th of December, 1863, in connection with the oath of the claimant?

The propriety of making an order for further proof?

And whether the remission by the Secretary of the Treasury entitles the claimant to the restoration of the vessel and cargo?

The proposition as to the proclamation and oath was not pressed in the argument here. If it were relied upon, the answers are obvious and conclusive.

There is no satisfactory proof that the claimant is not in | one of the p. 368

classes of excepted persons. His own affidavit, under the circumstances, is clearly insufficient to establish the negative. ' Property cases, where the rights of third persons shall have intervened,' are excluded in terms by the proclamation.

The proclamation is founded upon the act of July 17, 1862, and has reference only to property subject to confiscation as there denounced.

Both the statute and proclamation are wholly silent as to maritime captures like the one before us, and neither has any application to that class of cases. In no view of the subject can this proclamation be held to extinguish the liability of a vessel and cargo running the blockade, and seized *in flagrante delicto*. It would be a strange result in such a case if the subsequent oath of the claimant were allowed to establish his innocence and compel the restitution of the property.

This is not a proper case for an order for further proof. The order is always made with extreme caution, and only where the ends of justice clearly require it. The claimant forfeited all right to ask it by the guilty concealment in his first affidavit, and in his subsequent affidavit and claim. The allowance would hold out the strongest temptation to subornation of perjury. There is nothing to warrant such an exercise of our discretion. We are entirely satisfied with the testimony in the case, and entertain no doubt of the correctness of the conclusions we draw from it. If the allegations of the claimant are true, he postponed his effort to escape too long to derive any benefit from it. The law does not tolerate such delay. The motion is overruled.

The order of the Secretary of the Treasury does not affect the case. It is limited in its terms to the rights of the United States, arising from forfeiture under the act of July 13, 1861. That act provides ' that all goods and chattels, wares, and merchandise, coming from a State or part of a State in rebellion ' into the other parts of the United States, . . .
p. 369 ' by land or water,' . . . ' shall, together with the | vessel or vehicle conveying the same,' . . . ' be forfeited to the United States.' It contains nothing as to goods and vessels going from a rebel to a foreign or neutral port.

The Gray Jacket was not proceeding to a loyal State. It is true that after this objection was taken by the Attorney-General to the authority of the Secretary to interpose, the claimant amended his petition by interlining the averment that he was attempting to take the property ' into the loyal States by way of Havana, if his vessel should prove fit for the voyage.' But this does not recall what he had before sworn, nor change the facts as they are disclosed in the record. In his first affidavit he said, ' The voyage began in Mobile and was to have ended at Havana.' ' In case we had arrived at our destined port, I think I should have reshipped the cargo to some port where I could have obtained

a better price for it than I could obtain there.' The mate also testified 'that the voyage began at Mobile and was to have ended at Havana.' The claimant in his affidavit speaks of going to Havana, but was silent as to going beyond there, to any of the loyal States; and nowhere disclosed such a purpose until he amended his petition to the Secretary under the pressure of the occasion. We are satisfied that at the time of the capture no such intention existed. This brings the vessel and cargo within the exception prescribed by the Secretary. The order does not reach the case. But if the order of the Secretary were unqualified that the property should be released and discharged, the result would be the same. The power of the Secretary to remit forfeitures and penalties is defined and limited by law. The jurisdiction is a special one and he may not transcend it. If he do, his act is void. He has no power to remit in any case of property captured as maritime prize of war. The subject lies wholly beyond the sphere of his authority. The liability of the property is irrespective of the *status domicilii*, guilt or innocence of the owner. If it come from enemy territory, it bears the impress of enemy property. If it belong to a loyal citizen of the country of the captors, it is nevertheless as much liable to condemnation as if owned by a citizen or subject | of the hostile country or by the hostile government itself. p. 370
The only qualification of these rules is, that where, upon the breaking out of hostilities, or as soon after as possible, the owner escapes with such property as he can take with him, or in good faith thus early removes his property, with the view of putting it beyond the dominion of the hostile power, the property in such cases is exempt from the liability which would otherwise attend it.

Such, with this limitation, is the settled law of this and of all other prize courts.

The case before us, as we view it, has no redeeming feature. It has no claim to the benefit of the exception we have mentioned. The vessel and cargo were properly condemned as enemy property and for breach of the blockade. There is nothing persuasive to a different conclusion.

The decree of the court below is

AFFIRMED.

The Hampton.

(5 Wallace, 372) 1866.

1. In proceedings in prize, and under principles of international law, mortgages on vessels captured *jure belli*, are to be treated only as liens, subject to being overridden by the capture, not as *jura in re*, capable of an enforcement superior to the claims of the captors.
2. Neither the act of July 13th, 1861, providing (§ 5) that all goods, &c., comin from a State declared to be in insurrection 'into the other parts of the United States,' by land or water, shall, together with the vessel conveying the same,

be forfeited to the United States; but providing also (§ 8) that the forfeiture may be remitted by the Secretary of the Treasury, &c.; nor the act of March 3, 1863, 'to protect the liens upon vessels in certain cases,' &c., refers to captures *jure belli*; and neither modifies the law of prize in any respect.

An act of Congress of July 13, 1861,[1] passed during the late rebellion, enacted that goods, chattels, wares, and merchandise coming from or going to a State or section in insurrection, by land or water, along with the vessel in which they were, should be forfeited,—but gave the Secretary of the Treasury a right to remit. And another, passed March 3, 1863,[2] 'that in all cases now, or *hereafter* pending, wherein any ship, vessel, or other property shall be condemned in any proceeding, by virtue of the *acts above mentioned*, or of any *other* laws on that subject, the court rendering judgment shall first provide for the payment of *bonâ fide* claims of loyal citizens.'

In January, 1863, the schooner Hampton and her cargo were captured by the United States steamer Currituck in Dividing Creek, Virginia, and having been libelled in the Supreme Court for the District of Columbia, were condemned as prize of war. The master of the vessel was her owner, but interposed no claim; nor did any one claim the cargo. One Brinkley, however, appeared and claimed the vessel as mortgagee. The *bona fides* of his mortgage was not disputed; nor that he was a loyal citizen. But it was set up that neither by the laws of war nor under the acts of |
p. 373 Congress, could the claim be allowed. After a hearing the claim was dismissed by the court; the question involved, however, being certified by it to this court, as one of difficulty and proper for appeal. The matter was accordingly now here on appeal, taken by Brinkley, from the order dismissing his claim.

Mr. W. S. Waters, for the appellant and in support of the mortgage claim:

The question is, 'Does the mortgage as a claim prevail against the forfeiture?' We think it does.

The mortgage is a *jus in re*, and not a mere lien.[3]

Even then, if the case was unaffected by the act of Congress of March 3, 1863, the mortgage would prevail. This claim was not a secret one. Any fair and open claim existing at the time of capture upon property captured in war is valid, by the law of nations, if the claim amounts to a *jus in re*.[4]

The forfeiture in this case, however, was really for breach of municipal law, though the condemnation may have been through pleadings in

[1] 12 Stat. at Large, 256. [2] Id. 762.
[3] Conard *v.* Atlantic Ins. Co., 1 Peters, 441–447; Thelusson *v.* Smith, 2 Wheaton, 396.
[4] The Sally Magee, 3 Wallace, 451; The Tobago, 5 Robinson, 194; The Marianna, 6 Id. 24.

prize. The act of July 13, 1861, was in force when the capture was made, and applicable to the facts of this case and controlled it. The general law of nations, as applicable to the question, was repealed to the extent of the provisions of this statute. Even therefore if, on principles of international law, the mortgage claim would not be allowed, we submit that under the statute of July 13, 1861, it would. For undoubtedly all *municipal* forfeitures are subject to claims such as this when accruing before the act which causes the forfeiture.

But finally, the act of March 3, 1863, is applicable, whatever ground of forfeiture may be assumed. The vessel, it will hardly be denied, was condemned by virtue of laws applicable to the rebellion; and the act provides, that out of | the proceeds of the property so condemned, the p. 374
claim of any *bonâ fide* loyal citizen of the United States shall be paid.[1]

Mr. Ashton, Assistant Attorney-General, contra.

Mr. Justice MILLER delivered the opinion of the court.

The decree of condemnation of vessel and cargo stand unaffected, and the only question presented for our decision is, whether appellant is entitled to have the amount of his mortgage paid to him out of the proceeds of the sale of the vessel.

1. The first ground on which appellant relies is, that the mortgage being a *jus in re*, held by an innocent party, is something more than a mere lien, and is protected by the law of nations.

The mortgagee was not in possession in this case, and the real owner who was in possession admits that his vessel was *in delicto* by failing to set up any claim for her. It would require pretty strong authority to induce us to import into the prize courts the strict common law doctrine, which is sometimes applied to the relation of a mortgagee to the property mortgaged. It is certainly much more in accordance with the liberal principles which govern admiralty courts to treat mortgages as the equity courts treat them, as mere securities for the debt for which they are given, and therefore no more than a lien on the property conveyed.

But it is unnecessary to examine this question minutely, because an obvious principle of necessity must forbid a prize court from recognizing the doctrine here contended for. If it were once admitted in these courts, there would be an end of all prize condemnations. As soon as a war was threatened, the owners of vessels and cargoes which might be so situated as to be subject to capture, would only have to raise a sufficient sum of money on them, by *bonâ fide* mortgages, to indemnify them in case of such capture. If the vessel or cargo was seized, the owner need not appear, because he would be indifferent, having the value of his property in his | hands already. The mortgagee having an honest mort- p. 375
gage which he could establish in a court of prize, would either have the

[1] See The Sally Magee, 3 Wallace, 451.

property restored to him, or get the amount of his mortgage out of the proceeds of the sale. The only risk run by enemy vessels or cargoes on the high seas, or by neutrals engaged in an effort to break a blockade, would be the costs and expenses of capture and condemnation, a risk too unimportant to be of any value to a belligerent in reducing his opponent to terms.

A principle which thus abolishes the entire value of prize capture on the high seas, and deprives blockades of all dangers to parties disposed to break them, cannot be recognized as a rule of prize courts.

2. The second ground on which appellant relies is based upon the fact that the vessel was liable to confiscation under the act of Congress of July 13, 1861, and that the act of March 3, 1863, protects his rights in the premises.

This latter statute provides, ' that in all cases now or hereafter pending wherein any ship, vessel, or other property shall be condemned in any proceeding, by virtue of the acts above mentioned, or of any other law on that subject, the court rendering the judgment ' shall first provide for *bonâ fide* claims of loyal citizens. Although there is nothing in this act, or in its title, to show what the acts above-mentioned were, it may be conceded that the act of July 13, 1861, was one of them. But as the vessel in the case before us was not condemned in any proceeding, by virtue of that act, or of any law on that subject, but was condemned under the international laws of war by which she became lawful prize, it is difficult to perceive how the act of 1863 can have any application to the case. It is certainly not covered by its terms, and we think still less by its provisions.

Congress had, by several statutes, of which the act of July 13th was one, defined certain acts, or conditions growing out of the rebellion, which would render property liable to confiscation to the United States. It became evident that in many of these cases loyal citizens might have rights and interests in such property which justice required to be pro-
p. 376 tected. | Hence the passage of the act of March, 1863, and the eighth section of the act of July 13, 1861, the latter of which gives to the Secretary of the Treasury the power of remitting forfeitures and penalties incurred by virtue of that act.

We are quite satisfied that in neither of these provisions did Congress have reference to cases of condemnation as prize *jure belli*.

It is further said that because the vessel in this case was liable to condemnation under the act of July, 1861, although actually condemned under a principle of international law, the court is bound to apply the statute as though she had been condemned in a proceeding under it. We do not see the force of the argument. Both laws are in force. The vessel was liable under both. The government chose to proceed against

her under that law which prescribed the harder penalty. Its right to do so seems to us undeniable. The argument to the contrary would enable a person found guilty of a murder committed by burning down the house of his victim, to plead that he should only be sentenced to the penitentiary instead of being hung, because he was guilty of arson in addition to murder. The case of *The Sally*[1] is a direct decision of this court, that a statute creating a municipal forfeiture does not override or displace the law of prize.

We do not deny the full control of Congress over the law of prize as it may be administered in the courts of the United States whenever they choose to exercise it. But in the statutes relied on by appellant in this case, we see no evidence of any intention to modify that law in any respect.

There seems to be no reason to doubt the loyalty of appellant, or the fairness of his debt, and we regret our inability to provide for his claim. But until international treaties, or an act of Congress, shall mark another stage in the meliorations of the rigors of war, we are not at liberty to interpolate a principle which would tend so materially to destroy the right of prize capture in time of war.

DECREE AFFIRMED.

The William Bagaley.

(5 Wallace, 377) 1866.

1. Personal property left in a hostile country by an owner who abandons such country in order to go to the other belligerent, and so to return to his proper allegiance and soil, becomes, unless an effort is made with promptitude to remove it from such country, impressed with its character, and as such liable to the consequences attaching to enemy's property.
2. The presumption of the law of nations is against an owner who suffers such property to continue in the hostile country for much length of time.
3. The effect of war is to dissolve a partnership subsisting between citizens of nations at war; and if the person abandoning the hostile country, have had his property in partnership with citizens of the enemy country, it is his duty to dispose of, and withdraw his interest in the firm. If he do not, such interest is subject to the rule above stated with regard to individual property.
4. Ships in time of war are bound by the character impressed upon them by the government from which their documents issue and under whose flag and pass they sail. The share of a citizen in a ship sailing under an enemy's flag and papers, and who has had ample time and every facility to withdraw his effects from the enemy country, or dispose of such interests as could not be removed, but who has not attempted so to withdraw or dispose of them, is accordingly subject to capture and condemnation equally with the shares of enemies in the same ship. And where the cargo and ship are owned by the same person, the cargo follows the fate of the ship.
5. During the late rebellion, a loyal citizen domiciled at the time it broke out in

[1] 8 Cranch, 382.

one of the rebellious States, and trading there as a member of a commercial firm, abandoned it and removed to a loyal State. He never in any way aided or abetted the rebellion, but there was no evidence that he ever attempted or desired to withdraw his property from the rebellious region. In a year, more or less, after the rebellion broke out, the rebel authorities professed by one of their decrees to confiscate his interest in the firm; and the partners resident in the rebellious States—*he* having no connection with or knowledge of their action—loaded a ship which he alleged belonged to his firm when he left it, and which, in attempting, under papers, flag, officers, and crew of the Confederate States, to run the blockade established by the United States, two years before, of the Southern coast, was captured by a Federal cruiser.

Held, that so much time having elapsed after the proclamation and before the confiscation and the capture, without effort on the part of the loyal owner to get it away from the rebellious region, his share in vessel and cargo was rightly
p. 378 condemned with the shares of the partners in rebellion; | that the alleged confiscation was no excuse for his not having previously made an effort to withdraw or dispose of his interest in the firm, and that neither his loyal domicil during the rebellion, nor, under the circumstances, the confiscation, nor his want of connection with or knowledge of the enterprise, nor all combined, defeated the right of the captors.

6. In proceedings in prize, parties who were not in any way parties to the litigation in the District Court, and are neither appellants nor appellees, cannot come into this court and be heard as 'intervenors.'

Appeal from the District Court for the Eastern District of Louisiana.

The steamer William Bagaley,—with a register issued at Mobile, June 16, 1863, under the authority of the 'Confederate States,' and reciting a previous enrolment in 1857 and a present ownership,—'property having changed,'—by Waring and others ('citizens of the Confederate States' and 'trustees of association of stockholders'), with a master appointed by these trustees, and bearing the Confederate flag,—sailed from Mobile, July 17, 1863, during the blockade of that port, proclaimed April 19, 1861, by the United States, for Havana. Her cargo was of cotton, turpentine, &c. No papers were on board, for 'fear of being captured.' The 'cotton was shipped for the benefit of the owners in Mobile.' All the officers and crew were, with one exception, 'citizens of the Confederate States.' The master had instructions to escape the blockading vessels, but not to resist.

Being perceived by the blockading squadron, she was pursued, and, after a brisk chase, captured. Being brought into New Orleans and libelled for condemnation, a claim for one-sixth of the vessel and cargo was interposed by Joshua Bragdon, and of this sixth he prayed restitution.

The facts upon which he grounded his claim were, that he was, and for many years had been, a resident of the State of Indiana, a loyal State; that the firm of Cox, Brainerd & Co., of Mobile, Alabama, a rebel State, were the sole owners of the captured vessel and her cargo, of which firm the claimant had been for several years a member, and owned one-sixth
p. 379 interest in all the property of the copartnership, which interest | he had

never in any way transferred. That he was, and always had been, a true and loyal citizen of the United States, and that he had never, in any way, aided or abeted the rebellion, and after the breaking out of the same had never exercised any act of ownership or control over the property or the captured steamer, and that he had no connection with, or knowledge of, the unlawful voyage of the steamer which occasioned her capture. That in consequence of his loyalty, the so-called Confederate government seized all his interest and property in said firm of Cox, Brainerd & Co., and by a decree and process of one of her pretended courts, ' at some time during the year 1862,—the exact date not known,'—confiscated the same. That all such acts and proceedings of the insurrectionary government were void, and that the title of the claimant to his property remains unimpaired.

On the trial these facts were admitted of record by the District Attorney as true. The court dismissed the claim with costs, and condemned both vessel and cargo.

No other claim having been interposed in the proceedings in the lower court for any portion of the captured property or its proceeds, the only question presented by the appeal was the legal sufficiency and merit of the claim of Bragdon for his one-sixth.

After the case came into this court by appeal, however, the owners of the remaining five-sixths filed a petition asking to intervene for *their* interests. Their excuse for not appearing or putting in any claim in the District Court, it may be here stated, was, that they were residents of a State hostile to the United States, and had therefore no standing in that court; that this disability continued till after the case was removed into this court by appeal. And they set up, as reason for the restitution of their shares to them, that since the appeal they had received from the President ' a full pardon and amnesty for all offences by them committed arising from participation, direct or implied, in the said rebellion.' |

Messrs. Henry Crawford, S. S. Cox, and J. J. Lewis, for the appellants and for the petitioners: p. 380

There is no dispute about the facts. The case is to be taken as a special verdict or case agreed on and stated.

I. We have, then, a question of good prize or lawful property—a contest between the government and a citizen, whom she admits to have been unshaken in his allegiance during a long rebellion, as to the right of the former to forfeit his property, or her duty to restore the same upon his application.

If the United States has warrant as against the admitted rightful owner to forfeit this property as good prize, it can only be on account of the commission of some offence against the law of nations. There are only two such offences which can be relative to the present case. We will treat them in their order.

1. *The claimant's property in vessel and cargo cannot be forfeited as enemy's property.*

To justify condemnation of property for such reason it is necessary to establish (*a*) the domicil of the owner in the enemy's country, or (*b*) the employment of the property, either actually or constructively, by him in illegal trade with the enemy.

(*a*) Since it is not the place where a thing is, which determines the nature of that thing, but the character of the person to whom it belongs, the general principle upon the subject has always been, that the domicil of the party is the true test of national character and determines the nature of property.[1] And so the property of one resident in the enemy's territory is *res hostilis*, and the lawful subject of maritime capture.[2]

The question presented by this claim cannot be injuriously affected by the principle thus announced. The claimant here was not domiciled on the south side of what Grier, J.,[3] calls 'the boundary marked by lines
p. 381 of bayonets, which can be | crossed only by force;' nor had he at any time been 'a citizen or subject of any State or district in insurrection against the United States;' but, on the contrary, as the government admits, was, and long had been, a resident loyal citizen of the State of Indiana.

(*b*) The other criterion of 'enemy's property' is equally powerless to work a forfeiture. That test is thus defined by an eminent writer: 'All the property of enemies found afloat, and all property of citizens or subjects conducting themselves as belligerents, may be lawfully captured.'[4]

This rule has been applied in such a multitude of cases that a cursory reference to the language employed by courts cannot fail to give a correct appreciation of its true meaning and limitation. In the leading case of *The Rapid*,[5] it is said:

'A citizen or ally may be engaged in a hostile trade, and thereby involve his property in the fate of those in whose cause he embarks.'

Again, in another case:

'He incorporated himself into the permanent interests of the enemy.'[6]

In a third case, Sir William Scott says:

'By intendment of law, all property condemned is the property of enemies; that is, of persons so to be considered in the particular transaction.'[7]

[1] The Emanuel, 1 Robinson, 296; Upton's Laws of War, 113, 150.
[2] The Venus, 8 Cranch, 253; The Hoop, 1 Robinson, 196.
[3] Prize Cases, 2 Black, 635.
[4] Phillimore, International Law, vol. 3, § 345.
[5] 8 Cranch, 155
[6] Thirty Hogsheads of Sugar *v.* Boyle, 9 Cranch, 191.
[7] The Elsebe, 5 Robinson, 172.

Text-writers proceed in the same way :

' He who clings to the profits of a hostile connection must be content to bear its losses also.' [1]

Story, J., thus speaks :

' When a person is engaged in the commerce of the enemy | upon the p. 382
same footing and with the same advantages as native resident subjects, his property employed in such trade is deemed incorporated in the general business of that country, and subject to confiscation, be his residence where it may.' [2]

In the case of navigating under the pass or flag of the enemy, the party who uses them ' is not at liberty,' it is said in *The Fortuna Verissimo*, ' when they turn to his disadvantage, to deny the character which he has worn for his own benefit.' [3]

All these instances,—sailing under the enemy's pass or flag ; breach of blockade ; carriage of contraband ; establishment or continuance of a house of trade in the enemy's country ; illegal traffic with the enemy,—are cases of a *criminal voluntary adoption of the enemy character* by the citizen, odious violations of his duty to his government ; and justice requires that all his ventures so employed be the rightful subjects of capture and condemnation as enemies' property.

The application of this principle to the facts of the case at bar is not difficult. The claimant never was, at any time, within the insurrectionary lines ; he had no dominion over his property after the inception of the rebellion, and he had no participation in, connection with, or knowledge of, the transaction of his former copartners.

Instead, therefore, of the claimant's involving his property by ' embarking in the cause ' of the rebellion, within the meaning of the rule as laid down in *The Rapid*, he maintained his loyalty with such firmness that the rebel government confiscated his property as that of an alien enemy. He did not in any manner ' incorporate himself into the permanent interest of the enemy.' He is not seeking, as was the claimant in *The Fortuna Verissimo*, ' to deny the character which he has worn for his own benefit,' but he is striving | to maintain, as best he may, the p. 383
character of a consistently loyal citizen. Other than this he has neither sought nor worn. He has not been, in the language of Judge Story, ' engaged in the commerce of the enemy, upon the same footing, and with the same advantages, as resident subjects,' nor upon any footing or terms whatever. From the commencement of the rebellion, he stood aloof from his rebellious associates ; he maintained his proper fealty ; he turned

[1] Upton's Maritime War, 110 ; 1 Kent's Commentaries, 82.

[2] San Jose Indiano, 2 Gallison, 268 ; and see Maisonaire *v.* Keating, Id. 338 ; and The Friendschaft, 4 Wheaton, 105.

[3] 1 Dodson, 87 ; and see The Success, Id. 131 ; The Hiram, 1 Wheaton, 440 ; The Vigilantia, 1 Robinson, 13.

his back upon his property situated within the control of the insurrectionary forces, trusting in the power of the government to reassert its supremacy, and in its honor to restore. He has 'not clung to, nor received the profits of, any hostile connection,' but in thought and act has remained true to his obligations as a citizen. He has not, in any manner, 'conducted himself as a belligerent.'

2. *The claimant's property cannot be decreed good prize for any breach of blockade, unless the offence was committed in his interest and in person or by agent.*

The breach of blockade is viewed in all cases as a criminal act. This necessarily implies a criminal intent, and, of course, a knowledge of the existence of the blockade and the determination to violate it.[1]

The books bear testimony to the frequency with which the courts have enforced this discrimination between those who are wholly innocent, and those who are tainted with the corrupt design, and commit the overt act: the property of the one being restored, while full forfeiture is visited upon the latter. No doubt, it is a presumption of the law of prize, that a breach of blockade is committed in the interest of the cargo; and hence, *prima facie*, both vessel and cargo are subject to condemnation. Still if it be admitted that the owners of the cargo stood clear from even a possible intention of fraud, their property will be excepted from the penal consequence.[2]

p. 384 The leading authorities upon this point will be found collated | in *United States* v. *Guillem*, in this court.[3] There the vessel had been guilty of an undoubted violation of the law and was condemned accordingly, but upon the intervention of an innocent owner of a portion of the cargo, it was holden, that 'if the owner can show that he did not participate in the offence, his property is not liable to forfeiture.'

It is notable, also, how indulgently the courts construe the law in certain cases in favor of the personally innocent, even as against the wilful action of their agents. As when orders have been given for goods prior to the existence of a blockade, and it appears that there was not time for countermanding the shipment afterwards, the courts hold that the owner of the cargo is not responsible for the act of his enemy agent, who might have an interest in sending off the goods, in direct opposition to the interests of his principal.[4] Under similar circumstances[5] the cargo of an innocent neutral was restored; Sir William Scott saying:

'The rule that a principal is bound by the acts of his agent is obviously too rigid to be applied to a case where it is the interest of the agent to

[1] The Betsy, 1 Robinson, 92; The Nancy, 1 Acton, 59.
[2] United States *v.* Guillem, 11 Howard, 62; The Exchange, 1 Edwards, 43; The Neptunus, 3 Robinson, 173; The Adonis, 5 Id. 228.
[3] 11 Howard, 62.
[4] The Exchange, 1 Edwards, 39.
[5] The Neptunus, 3 Robinson, 173; and see The Adelaide, 3 Id. 281.

get the goods off, and run the risk of capture, while the principal is wholly innocent of the risk.'

This broad distinction between guilty property which may be, and the goods of innocent owners which cannot be forfeited, is recognized throughout all the administration of the law of prize. The case of the carriage of contraband furnishes an illustration. Formerly, under a less refined dispensation of the international code, the presence of contraband articles worked a forfeiture of the ship, but this too rigid rule has been relaxed in modern times to a forfeiture of freight and expenses only, save in aggravated cases, or when the contraband articles belong to the owner of the vessel.[1] To escape from the contagion of contraband, the innocent | articles must belong to a different owner,[2] for the penalty of p. 385
forfeiture extends only to all the property of the same owner involved in the same unlawful transaction.[3]

The distinction is also approved in the case of carriage of despatches, which works a forfeiture of the ship which conveys them, and *ob continentiam delicti* of the cargo *if they belong to the same owner*.[4]

Also, in the case of the carriage of enemy's goods in the ship of a neutral, when although the specific property is subject to capture, the lien of the neutral for his freight cannot be divested or forfeited.[5]

While the accepted doctrine is, that a deliberate and continued resistance to search is followed by the legal consequence of forfeiture, this consequence cannot be visited upon the cargo when the owner is innocent of any participation in the unlawful resistance.[6]

Determined by these tests the interest of the claimant is obviously beyond the reach of forfeiture. He comes fairly within the exception stated in *United States* v. *Guillem*, as 'he did not participate in the offence.'

There is, however, another principle touching the law of blockade, borrowed from the general admiralty practice, and of frequent application. Recognizing the full force of the maxim *qui facit per alium facit per se*, the law of nations holds the owners of vessels to be accountable for the acts of those to whom they have intrusted the vessel, and in such cases decrees forfeitures or awards restitution of the owner's property according to the criminal or lawful conduct of their agents.

Phillimore thus notices the doctrine of agency :[7]

'It is a general rule that ship and cargo are both confiscated | for p. 386
a breach of blockade, but then an important distinction must be taken,

[1] The Mercurius, 1 Robinson, 288 ; The Jonge Tobias, Id. 329 ; The Franklin, 3 Id. 217.
[2] The Staadt Embden, 1 Id. 26 ; Halleck's International Law, 573.
[3] 3 Phillimore's International Law, 372 ; The Floreat Commercium, 3 Robinson, 178 ; The Sarah Christina, 1 Id. 242.
[4] The Atalanta, 6 Id. 460.
[5] The Frances, 8 Cranch, 418 ; The Marianna, 6 Robinson, 25.
[6] The Nereide, 9 Cranch, 388.
[7] 3 International Law, 306.

viz., whether the owners of the cargo are, or are not identical with the owners of the ship. If they are not, the cargo is not confiscable, unless, before the goods were shipped, the owners were, or ought to have been, apprised of the existence of the blockade, or *unless it be shown that under the circumstances the act of the master personally binds them.*'

Sir William Scott in judicial decision holds similar language : [1]

' In a case of breach of blockade, in order to make the conduct of the vessel affect the cargo, it is necessary that the owners were or might have been cognizant, or *to show that the act of the master of the ship personally binds them.* The master is the agent of the owners of the vessel, and can bind them by his contracts or misconduct, but he is not the agent of the owners of the cargo unless specially so constituted.'

The reason for this rule of the owner's liability for his agent's conduct, is thus stated in one case by that great judge : [2]

' If the owner of the ship will place his property under the absolute management and control of persons who are capable of lending it to be made an instrument of fraud in the hands of the enemy, he must sustain the consequences of such misconduct on the part of his agent.'

And elsewhere, [3] thus :

' Owners of cargo must answer to the country imposing the blockade, *for the acts of the persons employed by them.*'

So again, in the case of *The Columbia.*[4]

p. 387 ' This vessel came from America, as appears, with innocent | intentions on the part of her American owners, for it was not known in America that Amsterdam was blockaded, and therefore there is no proof immediately affecting the owners. But a person *may be* penally affected by the misconduct of his agent as well as by his own acts ; and *if he delegated general powers to others and they misuse their trust,* his remedy must be against them.'

It is safe to assume that the authorities cited above, establish that no forfeiture can be incurred unless the offence was committed by some agent appointed by the owner, and touching the identical property intrusted to his care. If this be correct, it follows that the government fails to make out any case against the property of this appellant. It will be remembered that she admits, not only that he was personally innocent of all wrongful practices, but that since the beginning of the rebellion, he, ' in no way exercised any act of ownership or control over his property, and that he had no connection with or knowledge of the unlawful conduct and voyage of the vessel, for which she was condemned as prize.' He had appointed no agents ; no one was upon the vessel representing or pretending to represent him, or whose wrongful conduct could in the

[1] The Mercurius, 1 Robinson, 82 ; and see The Mary, 9 Cranch, 126 ; The Neptunus, 3 Robinson, 173.
[2] The Ranger, 6 Id. 126. [3] The James Cook, 1 Edwards, 261.
[4] 1 Robinson, 154 ; and see The Calypso, 2 Id. 161.

estimation of a wise and just code be justly imputed to him. Neither was the voyage planned or prosecuted in his interest, for his rebellious copartners had the exclusive control of the property, while his interest was attempted to be divested by the rebellious government, and no matter how remunerative the illegal voyage might have proven if successful, it stands upon the record that ' the claimant had no connection with or knowledge ' of it. He had ' employed ' no one ; ' had constituted no one master,' and so far as his property was concerned, their possession and use of it was wrongful as to him, for he had not intrusted it ' to any one.' Since the relation of principal and agent did not exist between him and any one on board the vessel, it is simply impossible, under the authorities quoted, and the evident justice and reason of the thing, that the claimant should be clothed with great responsibilities, and visited with heavy forfeiture for the conduct | of those, in whom he has reposed no authority whatever, p. 388
to whom he had intrusted no property, and whose every action was utterly beyond his control, and in direct denial of his rights.

So far as concerns Bragdon's interest in this property he was clothed by law with both the right of property and the right of possession, while his copartners had the naked possession of his interest without right, and under the decree of a false court, whose authority cannot for a moment be recognized. It would be preposterous to contend, that for the deeds of persons guiltily in the possession of property, the true and innocent owner is to be held responsible. ' Possession and use,' says this court in the early case of *The Resolution*,[1] ' ought upon a question of property to have the same influence in courts of admiralty as in courts of common law. It ought to be considered as a good title and as conclusive upon all mankind *except the right owner.* If the papers affirm the ship and cargo to be the property of an enemy, there must be a condemnation, unless those who contest the capture can produce clear and unquestionable evidence to the contrary.'

' Upon a piratical capture,' it declared in the later case of *The Josefa Segunda*,[2] ' the property of the original owners cannot be forfeited for the misconduct of the captors in violating the municipal laws of the country where the vessel seized by them is carried.'

An English case in point with the present, is *The Vriendschap*,[3] where a British ship having been captured by the enemy, was again captured by a British cruiser for a flagrant breach of blockade by a neutral in possession ; but the court adhering to the doctrine above quoted, ruled that the illegal acts of those illegally in possession did not divest the title of the rightful owner, and awarded restitution upon his intervening in the proceedings for condemnation.

If an opposite doctrine was conceded, no case could ever | occur in p. 389

[1] 2 Dallas, 1. [2] 5 Wheaton, 338. [3] 6 Robinson, 38.

which restitution could be awarded and the *jus postliminii* would remain to the mockery of the citizen an unmeaning fiction of the law.

3. *The fact that the claimant owns only a portion of the captured property instead of the whole, will not exclude him from the protection of the legal principles above established.*

Courts discriminate between the guilty and innocent co-owners of the same property, restoring one portion to the citizen and forfeiting the other as the property of enemies and subject to capture.

The exact case is thus put by Sir William Scott, in *The Jonge Tobias*.[1]

'Formerly, according to the old practice, the carriage of contraband worked a forfeiture of the ship, but in later times the rule has been relaxed to the forfeiture of the ship only when owned by the same person. *If he owns a share of the vessel, his share only will be condemned.*'

In Graham's claim,[2] Judge Story decides:

'I hold this shipment to be on joint account. I therefore hold William Graham as entitled to one-third part of the present shipment, and as he is a domiciled British merchant I condemn it as lawful prize to the captors. The other two-thirds belonging to citizens, I order to be restored.'

In another instance,[3] when a cargo was shipped from Malaga to St. Petersburg in an English vessel, by a Spanish house on joint account with a London firm, the same judge held, that while the share of the enemy was good prize, the interest of the neutral Spanish house could not be subjected to condemnation.

In *The San Jose Indiano and Cargo*, partners' interests were distinguished, the enemy's interests being condemned and citizens' restored, in divers instances.[4]

p. 390 It remains to direct the attention of the court to certain other rules of the international code, which authorize and require its restoration.

4. *The claimant having established an indefeasible legal title to this property, was entitled, as soon as it was rescued from the enemy, and came within the dominion of the United States, to full restitution thereof.*

The record shows, that long prior to the rebellion, the claimant was the owner of this property. That being within the insurrectionary district, he exercised no control over it, and it was continually within the rebellious territory and under the exclusive authority of rebellious citizens. That in the year 1862, the so-called Confederate government seized his property *jure belli*, and undertook to extinguish the title of the claimant, by a condemnation and sale. A new register appears to have been taken out after the sale, 'property having changed.' Then follows the capture by our cruisers.

[1] 1 Robinson, 329.
[2] 1 Gallison, 618.
[3] The Betsy, 2 Id. 210.
[4] 2 Id. 284, 298, 300, 301, 303, 304, 305.

There is then property ; an illegal capture by a government neither *de facto* nor *de jure*, but only a rank usurpation ; an illegal and void condemnation and sale, and then a restoration of the property to the power of the country of the rightful owner. It being conceded that no taint of fraud or disloyalty can be imputed to the claimant, it would seem to be a proposition almost too plain for argument, that the title of the original proprietor has not been divested by any of these transactions. That the seizure of his property by the insurgent government was illegal and riminal, and that the sentence of condemnation and the proceedings ubsequent thereto, were without the semblance of authority and void, are statements which it were idle to elaborate.

The obligation of the government under such a state of affairs, is clearly defined by the French writer Vattel : [1]

' The sovereign is bound to protect the persons and property of his subjects, and to defend them against the enemy. When, therefore, a subject or any part of his property has fallen into the enemy's possession, should any fortunate event bring them | again into the sovereign's p. 391
power, it is undoubtedly his duty to restore them to their former condition, to re-establish the persons in all their rights and obligations, to give back their effects to the owners, in a word, to replace everything on the same footing on which it stood previous to the enemy's capture.'

Our American author Halleck [2] redeclares the same thing :

' This right of postliminy is founded upon the duty of every state to protect the persons and property of its citizens against the operations of the enemy. When, therefore, a subject is rescued by the state or its agents he is restored to his former rights and condition under his own state, for his relations to his own country are not changed, either by the capture or the rescue. So of the property of the subject recaptured from the enemy by the state or its agents, it is no more the property of the state than it was before it fell into the hands of the enemy. It must therefore be restored to its former owner.'

This doctrine was recognized many years ago in England.[3]

When a British ship had been captured by the French, condemned as prize and fitted out by them as a vessel of war, and was then recaptured by a British cruiser, it was held that a British subject had always a right, not barred by any given duration of time, to restitution of his property.[4]

During the war of the rebellion, this right of the citizen to his property and the obligation of the government to restore, have been conceded and enforced and restitution awarded to the true owners.[5] |

Outside the doctrine of postliminy, which rests upon its own peculiar p. 392

[1] Page 385, 391.
[2] International Law, 866, § 2 ; and see, The Acteon, 2 Dodson, 48.
[3] Woodward *v.* Larking, 3 Espinasse, 286.
[4] The Renard, Hay & Marriott, 222 ; and see, the Vriendschap, 6 Robinson, 38.
[5] The Mary Alice ; The H. C. Brooks ; Lizzie Weston, M. S. Decisions of South. Dist. of New York ; Claims of Lear & Sons and Irvin & Co., approved and allowed.

principles, the courts of admiralty have been diligent in restoring property in all cases where the original owner's title has not been lawfully divested, and it is now a doctrine of universal acceptance, that the original title must prevail, unless the property was captured by a lawful enemy, in a lawful manner, and a sentence of condemnation by a competent court has intervened.

It is not essential for the operation of this rule that the capture should be piratical. 'A capture, though not piratical, may be illegal and of such a nature as to induce the court to award restitution.'[1] If property be retaken from a captor clothed with a lawful commission, but not an enemy, it must be restored. For the act of taking being a wrongful act could not change the property. And so our courts have invariably decided that where a capture is made of the property of the subjects of a nation in amity with the United States, by a vessel, built, owned, equipped, and armed in the United States, it is illegal, and if the property is brought within the jurisdiction of this country, it will be restored to the original owner.[2]

The absence of a valid sentence of condemnation is considered equally fatal as an illegal capture.

If a neutral state seize and sell the vessel, there being no sentence of condemnation, the title is not changed.[3]

Where a British ship had been captured, carried into Norway, and condemned before a French consul, it was held that the sentence was invalid, and the property should be restored.[4] A case is cited at the end of *Assievedo* v. *Cambridge*, in 1695, reported by Lucas,[5] where restitution was decreed after a long adverse possession, two sales, and several voyages. |

p. 393 Inasmuch as in the case at bar, the original seizure by the insurgents was unlawful, and the sentence of condemnation utterly invalid, the application of these authorities is obvious. Upon the general doctrine of restitution, the reasoning of this court in *The Resolution* is very appropriate :

'All the authorities cited on cases of capture authorized by the rights of war are where the property captured was the property of an enemy. Not an instance has been produced where a capture not authorized by the rights of war has been held to change the property. To say that a capture which is out of the sanction and protection of the rights of war can nevertheless derive a validity from the rights of war, is surely a contradiction in terms. The rights of war can only take place among

[1] Talbot *v.* Janson, 3 Dallas, 133.

[2] La Conception, 6 Wheaton, 235 ; The Arrogante Barcelones, 7 Id. 496 ; The Santa Maria, 7 Id. 490 ; The Monte Allegre, 7 Id. 520 ; The Fanny, 10 Id. 658 ; The Bello Corrunes, 6 Id. 152 ; The Vrow Anna Catharina, 5 Robinson, 20.

[3] Wilson *v.* Forster, 6 Taunton, 25.

[4] The Kierlighett, 3 Robinson, 99.

[5] 10 Modern, 77.

enemies, and therefore a capture can give no right unless the property captured be the property of an enemy.'

5. *The object of the war against rebellion as prosecuted by the government, and its policy repeatedly declared by the legislative and executive departments and followed by the judiciary, require the restoration of this property.*

By the rebellion of 1861, it 'became necessary,' 'for the general government to vindicate by arms its own rights and the rights of its citizens.'

These words comprehend in and of themselves the whole scope and object of the war of self-defence in which the nation has been engaged for the past few years.

Congress resolved early in the struggle that the war was not waged for conquest or oppression, but 'to defend and maintain the supremacy of the Constitution, and to preserve the Union.'[1]

By the acts of July 13, 1861, and July 29, 1861, to provide for the suppression of the rebellion, and under the authority of which the war has been mainly carried on, it is enacted that whenever it becomes impracticable to enforce the laws of the United States by the ordinary course of judicial proceedings, it shall be lawful to call out the militia, | and employ the army and navy '*to enforce the faithful execution of the* p. 394 *laws, and suppress such rebellion.*'

The President says, in his proclamation of September 22, 1862:

'I do hereby proclaim and declare that hereafter as heretofore, the war will be prosecuted for the object of practically restoring the constitutional relation between the United States and each of the States and people thereof, in which State that relation is or may be disturbed.'

These declarations of the object of the war have been followed by the courts. 'The war, so far as the government has been an actor,' says Betts, J., in *The Hiawatha*, 'has been defensive, and in protection of the existence and property of the government, and the welfare of its citizens.' 'In a civil war,' says Sprague, J., in *The Amy Warwick*, 'the military power is called in only to maintain the government in the exercise of its legitimate civil authority.'

But, while the object of the war was thus clearly defined, the condition of affairs was so anomalous, the contest of such gigantic size, and extended over such a vast territory, that any measures which the government might take to defend its existence and restore its supremacy, would necessarily affect the deserving,—the loyal as well as the disloyal.

It is instructive, however, to note with what jealous care Congress and the Executive so ordered and wielded the belligerent power of the nation, that while it was a weapon against treason, it was as far as possible

[1] Mr. Crittenden's resolution, July, 1861.

a shield for the loyal and the oppressed. Whiting[1] says upon this subject:

'The President having adopted the policy of protecting loyal citizens, wherever they may be found, all seizure of their property and all interference with them have been forborne.'

The President, in his proclamation of September 22, 1862, declares:

p. 395 'The Executive will in due time recommend that all loyal | persons shall be compensated for all losses they may have incurred by acts of the United States.'

The letters of Admiral Porter to the Secretary of the Navy, of May 11 and 31, 1864, touching the Red River cotton, and the proclamation of General Butler[2] on taking possession of New Orleans, are but reiterations of the general policy of the government.

By legislation in every form, the legislative department of the nation has recognized the same distinction and provided for the protection of all who have in fact maintained their allegiance.

Section 1, of the act of August 6, 1861, 'to confiscate property used for insurrectionary purposes,' enacts that if any person shall knowingly use his property, or suffer it to be used in aiding, abetting, or promoting the insurrection, such property shall be the lawful subject of prize and capture.

The act of July 31, 1861, appropriates two millions of dollars to purchase arms 'to place in the hands of the loyal citizens residing in any of the States, of which the inhabitants are in rebellion against the government of the United States.'

Section 9, of the act amending an act regulating commercial intercourse, July 2, 1864, prohibits all further intercourse 'except to supply the necessities of loyal persons residing in the insurrectionary States.'

Section 3 of the act to provide for the collection of abandoned property, March 3, 1863, ch. 120, provides, that when the property of any one resident in the seceded States has been seized and sold by virtue of the act, the owner may go before the Court of Claims within two years after the suppression of the rebellion, and, upon proof of his loyalty, will be entitled to receive the proceeds arising from the sale of his property.

Section 7 of the Confiscation Act, July 17, 1862, enacts that 'if said
p. 396 property shall be found to have belonged to a | person engaged in rebellion, or who has given aid or comfort thereto, the same shall be condemned as enemy's property.'

An act to protect certain liens, March 3, 1863, provides that if any loyal citizen holds a lien upon any vessel or other property, that the same shall be preferred to the claim of the government for condemnation.

Section 7 of the act regulating the collection of direct taxes in

[1] War Powers, 59. [2] See 2 Wallace, 264.

insurrectionary districts, allows any loyal citizen having a lien upon any real estate which has been sold for taxes to redeem the same. February 6, 1863.

It would seem, therefore, from the testimony of these measures, that both the executive and legislative branches of the government have declared the settled policy of the nation to be, that no forfeitures shall be inflicted in this war on any but the rebellious, and that under all contingencies the truly loyal citizens South and North shall be protected and secured in the enjoyment of their rights of person and of property. To put any other construction upon these enactments and the general conduct of the war, would be to shut our eyes against their obvious and accepted meaning. Such policy is in recognition of the obligations which a just government owes to its faithful citizens, and may well be called *the policy of justice.*

The policy of magnanimity pursued by the government to its rebellious citizens is embraced in the proclamations of protection, amnesties, pardons, and restorations to property and privileges, which are familiar to all, and are in strict conformity with the declared object of the war. Touching the latter, this court, in the late case of *The Venice*,[1] has approvingly said :

'The same policy may be inferred from the conduct of the war. Wherever the national troops have re-established order under national rule, the rights of persons and property have been in general respected and enforced. Officer Farragut and General Butler expressed in proclamation the general policy of | the government. Both were the mani- p. 397
festation of a general purpose which seeks the establishment of the national authority, and the ultimate restoration of States and citizens to their national relations under better forms and firmer guarantees, without any views of subjugation by conquest.'

Keeping in view the declared object of this war, how is it possible to say that the condemnation of the property of a loyal citizen of a loyal State is a warrantable exercise of belligerent right ; that it would conduce in the remotest degree to the accomplishment of the desired end ? For any such purpose it would be wholly impotent. Contributing nothing to 'the reparation of injury, the re-establishment of right, and the restoration of order,' such action on the part of government would of itself be an injury to the citizen, a palpable denial of his common and constitutional right, and the sure promoter of disorder and discontent. Against any such forfeiture the government has deliberately set its face. She has pledged herself to her loyal citizens in every form by which a government can express its deliberate purpose,—by legislative enactments, executive proclamations, judicial decisions, the consistent management of war,—that this conflict has been waged for the protection, and not the destruction,

[1] 2 Wallace, 274.

of those rights. This claimant alike with every other true citizen has the right to demand, as he does now demand, that the government shall make good her pledges by according to him the full measure of his rights.

II. *As to the remaining owners, now petitioners in this court.*

Though ordinarily an appellate court receives no evidence which was not presented on the hearing in the court below, in all admiralty causes the rule is different. The case, when an appeal is taken and perfected, is heard *de novo*, and there is no final decree till the appellate court has acted and determined by *decree* the rights of the claimants to the fund.[1]

In the case of *The Schooner Pinkney*, the vessel was condemned in the
p. 398 District Court for violation of the act of Congress | prohibiting commercial intercourse with certain parts of the Island of St. Domingo. An appeal was taken first to the Circuit Court, and afterwards to this court. Pending the last appeal the act expired by its own limitation. In delivering judgment, Chief Justice Marshall says :

'The majority of the court is clearly of opinion that in admiralty cases *an appeal suspends the sentence altogether*, and that it is not *res adjudicata* until the final sentence of the appellate court is pronounced. The cause in the appellate court is to be heard *de novo*, as if no sentence had been passed. This has been the uniform practice, not only in cases of appeal from the District to the Circuit Court of the United States, but in this court also. In prize causes the principle has never been disputed.'[2]

In *The Venus*, a prize case, the court says, 'The cause is before us as if in the inferior court.'

Under this rule it is allowable to allege and prove what was not alleged or proved in the court below.[3]

And, until a decree has been actually made, the court is bound to consider every claim against the fund in court.[4]

The case stands, therefore, upon the same footing as though the condemnation had not been decreed in the District Court ; and the question presented is, whether this court, having a grasp upon the fund, and being called on to make distribution, will not, sitting in admiralty as in equity, make an order of distribution as justice and equity shall appear to require.

The rights of these claimants, as distributees, depend on the force and effect of the several pardons granted them by the President. [The counsel then went into a consideration of the effect of the pardons.] |

[1] Boone *v.* Chiles, 10 Peters, 177 ; United States *v.* Schooner Peggy, 1 Cranch, 103.

[2] Yeaton *v.* United States, 5 Cranch, 281. And see Penhallow *v.* Doane, 3 Dallas, 87, 119 ; United States *v.* Preston, 3 Peters, 57.

[3] Maley *v.* Shattuck, 3 Cranch, 458 ; Brig James Wells, 7 Id. 22 ; The Clarissa Claiborne, Id. 107 ; The Samuel, 1 Wheaton, 9, 112 ; The Marianna Flora, 11 Id. 1 ; The Sally Magee, 3 Wallace, 459.

[4] Constancia, 10 Jurist, 849.

Mr. Ashton, Assistant Attorney-General, contra : p. 399

I. *As to the claim of Bragdon for the one-sixth.*

Giving the fullest effect to the case as stated by the claimant, it is, on its face, a case of enemy property and breach of blockade.

1. The partnership of Cox, Brainard & Co., of which the claimant was a member, was established and *domiciled* in the enemy country.[1]

2. Such a partnership is, by the law of war, treated throughout as a *hostile establishment*, and the whole partnership property is liable to capture and condemnation as enemy's property, notwithstanding one or more of the partners may be domiciled in a neutral country ; *à fortiori*, if some of the partners are domiciled in one of the hostile countries and the rest in the other, the partnership is hostile, and the partners are also personally enemies.[2]

3. The courts of prize, in the language of Lord Stowell, in *The Vrow Elizabeth*,[3] regard vessels as having ' a peculiar character impressed upon them by the special nature of their documents, and they have always been held to the character with which they are so invested to the exclusion of any claims of interest that persons living in neutral countries may actually have in them.'

During the war with Russia, Dr. Lushington, in England, had occasion to consider and apply the doctrine enunciated in *The Vrow Elizabeth*, in the cases of two vessels, *The Primus* and *The Industrie*, under the Russian flag, portions of which belonged to Russian subjects, the other shares being owned by neutral Danes.[4] These cases both occurred at the beginning of hostilities, and the neutral part-owners were *bonâ fide* entitled to their shares at a period antecedent to the war and up to the time of seizure. |

He held that the claims were not maintainable, and that the neutral p. 400
as well as the hostile shares were confiscable ; that the flag and pass are binding on all persons having property in the ship ; that whoever embarks his property in shares of a ship is bound by the character of that ship, *whatever it may happen to be* ; that where a vessel is sailing under a neutral flag, the captors may show that the property is not neutral, but part of it belongs to an enemy, and in that case you divide it and condemn the part which is hostile, and not that part which is neutral ; and that the proposition is not true *vice versa*, that where a vessel is sailing under a *hostile flag* you can claim on behalf of the neutral the property under an enemy's flag ; and that no distinction could be made between the flag being adopted prior to the commencement of hostilities, and when there

[1] The San José Indiano, 2 Gallison, 286.
[2] The Friendschaft, 4 Wheaton, 107 ; The Antonia Johanna, 1 Id. 167 ; The Franklin, 6 Robinson, 127.
[3] 5 Robinson, 11.
[4] The Primus, 29 English Law and Equity, 589 ; The Industrie, 33 Id. 573.

was no reason to suppose that hostilities would have taken place, and the flag being adopted *flagrante bello*.

These two cases were cases of *part-owners*, whereas the present case is one of alleged ownership by a *partnership*, to which the doctrines just stated are, *à fortiori*, applicable.

4. This court has in recent cases confiscated the interests of Northern persons in vessels engaged in commerce with the rebel ports for *illicit trading with the enemy*, altogether irrespective of any agency or complicity, on the part of such owners, in the guilty voyages.

In the case of *The Pilgrim*,[1] the vessel was owned, two-thirds in New Orleans, and one-third in New York and Connecticut, and was captured for breach of blockade of New Orleans. Grier, J., said that ' the cargo and two-thirds of the vessel were liable to confiscation as enemy property, and the remainder for illicit trading with the enemy.'

In the case of *The Herald*,[2] a British vessel was partly owned in New York, and the court held that ' the shares of the vessel owned in New York might be condemned for trading with the enemy, but it is enough that vessel and cargo were equally involved in breach of blockade.' |

p. 401 In neither of these cases was there any imputation of guilty knowledge of the breach of blockade on the part of the loyal Northern part-owners.

5. Admitting the allegation of the partnership and of the ownership of this vessel by the firm at the time of capture, the claimant of course has no interest, right, or share, in any of the property of the firm, except what remains after the discharge and payment of all the debts and liabilities of the partnership, and therefore cannot claim or receive restitution of any particular portion of such property as representing the value of his interest therein.

A court of prize has no means of settling the accounts of the firm and determining the particular interests of the several members in the property. The ownership of this vessel was in the firm, and the resident members at Mobile, who were in possession of her, had authority to divest their own interests, as well as the interest of the Northern member, in virtue of their general power and agency as recognized by the law of partnership.

6. A transfer of the vessel had been effected before the present voyage to other persons, who obtained the register found on board, which divested the interest of the firm who may have owned her before the war. But all interests and rights in both the vessel and the cargo are confiscable for breach of blockade. It is not competent for owner of either vessel or cargo, in such case, to protect his property from condemnation by showing innocence in the transaction. All parties are

[1] December Term, 1863, No. 113.

[2] 3 Wallace, 768.

concluded by the illegal act of the master, though it may have been done without their privity, and even contrary to their wishes. It is the act and intention of the master which determine the guilt or innocence of the property and its liability to confiscation; and this applies equally to vessel and cargo.[1]

7. A hostile character is impressed upon the vessel by the specifically hostile character of the *trade* in which she had | been engaged during the p. 402
war, independently of the *domicile*, status, or relations of the owners.[2]

When a vessel is engaged *de facto* for a period of two years exclusively in the navigation and trade of the enemy's country, in the possession and control of enemies, and under their flag, the question of ownership does not arise, and she is confiscable in consequence of the hostile taint which such use and employment affix upon the property.

II. *As to the petitioners, rebel owners of the five-sixths.* Conceding, *argumenti gratiâ*, that they had a right to be heard in this court, not having appeared in the other, the effect of the pardon is not sufficiently clear in a case of seizure like the present.[3]

Mr. Justice CLIFFORD delivered the opinion of the court.

The steamer and cargo were captured as prize of war on the 18th day of July, 1863, and, having been duly libelled and prosecuted as such in the District Court, on the 17th day of August following, they were both condemned as forfeited to the United States. Monition was duly published, but no one appeared as claimant, either for the steamer or cargo. Directions of the decree of condemnation were, that the steamer and cargo, after ten days' public notice, should be sold by the marshal, and that the proceeds of the sale should be deposited in the registry of the court for distribution, according to law. Return of the marshal shows that the notice was duly given, and that the sale was made as directed by the decree. Proceeds of the sale were paid to the marshal, but before the amount was actually deposited in the registry of the court the appellant filed his petition of intervention, claiming one-sixth of the proceeds, upon the ground that he was the true and lawful owner of one-sixth part of the vessel and cargo. Allegations of the petition of intervention were, in substance and effect, as follows: |

1. That the petitioner was, and for many years had been, a citizen p. 403
of the State of Indiana; that at the breaking out of the rebellion he was a member of the firm of Cox, Brainard & Co., at Mobile, Alabama; that the partners of the firm, as such, were the sole owners of the steamer and cargo; and that he had never parted with his share or in any way transferred his interest in the partnership.

[1] Baltazzi *v.* Ryder, 12 Moore's Privy Council, 184.
[2] The Vigilantia, 1 Robinson, 1; The Embden, Id. 16; The Endraught, Id. 22; The Planter's Wensch, 5 Id. 227; The Bermuda, 3 Wallace, 545.
[3] See The Gray Jacket, *supra*.

2. That the steamer, after the rebellion broke out to the time of the capture, was continually in the waters of the rebellious States, and under the control and management of those engaged in the rebellion, which rendered it impracticable and unlawful for him to proceed to the place where the steamer was, or to exercise any control over the steamer or any part of the partnership property.

3. That he was, and always had been, a true and loyal citizen ; that he had never given any aid, encouragement or assistance to the rebellion, and that he had no connection with, or knowledge of, the unlawful voyage of the steamer on account of which she was condemned as lawful prize.

4. That some court of the Confederate States, so called, at some time in the year 1862, had condemned and confiscated his interest in the partnership, but he averred that the decree was wholly nugatory and void, and that his interest in the steamer and cargo had never been extinguished or destroyed.

Basing his claim upon these allegations of fact, he prayed that he might be paid out of the proceeds of the sale one-sixth of the amount required to be paid into the registry of the court.

Exceptions were filed to the petition of intervention, but they were overruled by the court, and the District Attorney appeared and admitted that all the facts therein alleged were true. Parties were heard as upon an agreed statement, and the District Court entered a decree that the intervention and claim of the petitioner be rejected and dismissed, with costs. Appeal was taken by the intervenor from that decree, and he now
p. 404 seeks to reverse it, upon the ground that he, as | owner of one-sixth part of the steamer and cargo, is entitled to one-sixth of the proceeds of the sale.

1. Captors contend that the steamer and cargo were both rightfully condemned as enemy property, and also for breach of blockade. Appellant denies the entire proposition as respects his interest in the captured property, and insists that the one-sixth of the same belonging to him cannot properly be condemned on either ground, because he was never domiciled in the rebellious States, and because he never employed the property, either actually or constructively, in any illegal trade with the enemy, or in any attempt to break the blockade.

Projected voyage of the steamer was from Mobile to Havana, and the master testified that she sailed under the Confederate flag. Proofs show that she left her anchorage in the night-time, and that she was captured, as alleged in the libel, after a brisk chase by several of our blockading squadron, more than two hundred miles from the port of departure. When captured, she had on board a permanent register, issued at Mobile under Confederate authority, and which described her owners as trustees of a certain association, and citizens of the Confederate States.

Testimony of the master showed that the cargo, which consisted of seven hundred bales of cotton, three thousand two hundred staves, and one hundred and twenty-five barrels of turpentine, was consigned to parties in Havana, and that the shipment was for the benefit of owners residing at the home port. Except an informal manifest, the steamer had no papers on board relating to the cargo, and the master testified that she carried none for the consignee, 'for fear of being captured.' He was appointed by the trustees, and he also testified that his instructions were to elude the blockading vessels if possible, but not to resist in case he was unable to escape. Ship's company consisted of thirty men, and all the officers and crew, with one exception, were citizens of the enemy country. Direct admission is made by the master in his testimony that he stole out of the harbor, and that the steamer and cargo were captured for breach of | blockade. Such an admission was hardly p. 405
necessary to establish the charge, as every fact and circumstance in the case tended to the same conclusion. Five-sixths of the steamer and cargo were confessedly enemy property, and the whole adventure was projected and prosecuted for the benefit of resident enemy owners. None of these facts are controverted by the appellant, but he insists that inasmuch as he was domiciled in a loyal State, and had no connection with the adventure or the voyage, his interest cannot properly be held liable to capture.

2. War necessarily interferes with the pursuits of commerce and navigation, as the belligerent parties have a right, under the law of nations, to make prize of the ships, goods, and effects of each other upon the high seas. Property of the enemy, if at sea, may be captured as prize of war, but the property of a friend cannot be lawfully captured, provided he observes his neutrality. Public war, duly declared or recognized as such by the war-making power, imports a prohibition by the sovereign to the subjects or citizens of all commercial intercourse and correspondence with citizens or persons domiciled in the enemy country.[1]

Neutral friends, or even citizens, who remain in the enemy country after the declaration of war, have impressed upon them so much of the character of enemies, that trading with them becomes illegal, and all property so acquired is liable to confiscation.[2]

Part-owners of ships are seldom partners in the commercial sense, because no one can become the partner of another without his consent, and because if they acquire title by purchase, they usually buy distinct shares at different times and under different conveyances, and even when they are the builders they usually make separate contributions

[1] Jecker *v.* Montgomery, 13 Howard, 498.
[2] The Hoop, 1 Robinson, 196; Maclachlan on Shipping, 473; The Rapid, 8 Cranch, 155; Potts *v.* Bell, 8 Term, 561; Wheaton's International Law, by Lawrence, 547.

p. 406 for the purpose. Generally speaking, they are only tenants in | common ; but the steamer, in this case, belonged to the partnership, and throughout the rebellion to the time of capture was controlled and managed by the partners in the enemy country.[1]

Even where the part-owners of a ship are tenants in common the majority in interest appoint the master and control the ship, unless they have surrendered that right by agreeing in the choice of a ship's husband as managing owner.[2]

Admiralty, however, in certain cases if no ship's husband has been appointed, will interfere to prevent the majority from employing the ship against the will of the minority without first entering into stipulation to bring back the ship or pay the value of their shares. But the dissenting owners, in such a case, bear no part of the expenses of the voyage objected to, and are entitled to no part of the profits. Such are the general rules touching the employment and control of ships ; but unless the co-owners agree in the choice of a managing owner, or the dissenting minority go into admiralty, the majority in interest control the employment of the ship and appoint the master.[3]

Tenants in common of a ship can only sell their own respective shares, but where the ship belongs to a partnership one partner may sell the whole ship.[4]

3. Proclamation of blockade was made by the President on the nineteenth day of April, 1861, and on the thirteenth day of July, in the same year, Congress passed a law authorizing the President to interdict, by proclamation, all trade and intercourse between the inhabitants of the States in insurrection and the rest of the United States.[5]

Provision of the sixth section of the act is, that after fifteen days from the issuing of such proclamation, ' any ship or vessel belonging in whole or part to any citizen or inhabitant ' of a State or part of a State, whose
p. 407 inhabitants shall | be so declared to be in insurrection, if found at sea or in the port of any loyal State, may be forfeited. Reference is made to those provisions, as showing that our citizens were duly notified that Congress as well as the President had recognized the undeniable fact that civil war existed between the constitutional government and the Confederate States ; and that seasonable notice was given to all whose interests could be affected, and that ample opportunity and every facility were extended to them, which could properly be granted, to enable them to withdraw their effects from the States in rebellion, or to dispose of such interests as in the nature of things could not be removed.

[1] Helme *v.* Smith, 7 Bingham, 709.
[2] Smith's Mercantile Law, 6th ed. 197.
[3] Maude & Pollock on Shipping, 67, 72.
[4] 3 Kent's Com., 11th ed. 154 ; Wright *v.* Hunter, 1 East, 20 ; Lamb *v.* Durant, 12 Massachusetts 54.
[5] 12 Stat. at Large, 1258, 257.

Open war had existed between the belligerents for more than two years before the capture in this case was made, and yet there is not the slightest evidence in the record that the appellant ever attempted or manifested any desire to withdraw his effects in the partnership or to dispose of his interest in the steamer. Effect of the war was to dissolve the partnership, and the history of that period furnishes plenary evidence that ample time was afforded to every loyal citizen desiring to improve it, to withdraw all such effects and dispose of all such interests. 'Partnership with a foreigner,' says Maclachlan, 'is dissolved by the same event which makes him an alien enemy;' and Judge Story says, 'that there is in such cases an utter incompatibility created by operation of law between the partners as to their respective rights, duties, and obligations, both public and private, and therefore that a dissolution must necessarily result therefrom, independent of the will or acts of the parties.' [1]

Executory contracts with an alien enemy, or even with a neutral, if they cannot be performed except in the way of commercial intercourse with the enemy, are *ipso facto* dissolved by the declaration of war, which operates to that end and for that purpose with a force equivalent to that of an act of Congress.[2] |

Duty of a citizen when war breaks out, if it be a foreign war, and he p. 408
is abroad, is to return without delay; and if it be a civil war, and he is a resident in the rebellious section, he should leave it as soon as practicable and adhere to the regular established government. Domicile in the law of prize becomes an important consideration, because every person is to be considered in such proceedings as belonging to that country where he has his domicile, whatever may be his native or adopted country.[3]

4. Personal property, except such as is the produce of the hostile soil, follows as a general rule the rights of the proprietor; but if it is suffered to remain in the hostile country after war breaks out, it becomes impressed with the national character of the belligerent where it is situated. Promptitude is therefore justly required of citizens resident in the enemy country, or having personal property there, in changing their domicil, severing those business relations, or disposing of their effects, as matter of duty to their own government, and as tending to weaken the enemy. Presumption of the law of nations is against one who lingers in the enemy's country, and if he continue there for much length of time, without satisfactory explanations, he is liable to be considered as remorant, or guilty of culpable delay, and an enemy.[4]

[1] Maclachlan on Shipping, 475; Story on Partnership, sec. 316; Griswold *v.* Waddington, 15 Johnson, 57; Same case, 16 Id. 438.

[2] Exposito *v.* Bowden, 7 Ellis & Blackburne, 763.

[3] The Vigilantia, 1 C. Robinson, 1; The Venus, 8 Cranch, 288; 3 Phillimore's International Law, 128.

[4] Maclachlan on Shipping, 480; The Ocean, 5 Robinson, 91; The Venus, 8 Cranch, 278.

Ships purchased from an enemy by such persons, though claimed to be neutral, are for the same reasons liable to condemnation, unless the delay of the purchaser in changing his domicile is fully and satisfactorily explained. Omission of the appellant to dispose of his interest in the steamer, and his failure to withdraw his effects from the rebellious State, are attempted to be explained and justified, because the same were, as alleged in the petition, confiscated during the rebellion under the authority of the rebel government. More than a year, however, had elapsed after
p. 409 the proclamation | of blockade was issued before any such pretended confiscation took place. Members of a commercial firm domiciled in the enemy country, whether citizens or neutrals, after having been guilty of such delay in disposing of their interests or in withdrawing their effects, cannot, when the property so domiciled and so suffered to remain, is captured as prize of war, turn round and defeat the rights of the captors by proving that their own domicile was that of a friend, or that they had no connection with the illegal voyage.

Property suffered so to remain has impressed upon it the character of enemy property, and may be condemned as such or for breach of blockade. Prize courts usually apply these rules where the partnership effects of citizens or neutrals is suffered to remain in the enemy country, under the control and management of the other partners who are enemies. But there are other rules applicable to ships owned under such circumstances which must not be overlooked in this case.

5. Courts and text-writers agree that ships are a peculiar property, and that such peculiarity assumes more importance as a criterion of judicial decision in war than in peace. They have a national character as recognized by the law of nations, because they regularly carry the flag of the nation to which they belong. Evidences of ownership are also peculiar, but vary somewhat according to the laws of the country in which the ships were built, or in which they are owned.[1]

Commercial nations generally have, for the advancement of their own individual prosperity, conferred great privileges upon the ships belonging to their own citizens, and, in consideration thereof, have imposed upon their owners certain special duties and obligations. Usually they are required to be registered at the home port, and they are not allowed to sail on any voyage, foreign or coasting, without such papers as the laws of the country to which they belong require.[2]

American vessels sailing for a foreign port are, in all cases, required
p. 410 by law to carry a passport, and it is generally admitted | that such a document is indispensable in time of war.[3] When a ship is captured as prize

[1] Wheaton's International Law, by Lawrence, p. 580.
[2] Abbott on Shipping, 72.
[3] 1 Stat. at Large, 489. Maude & Pollock on Shipping, 95.

of war she is bound by the flag and pass under which she sailed. Owners are also bound by those insignia of national character. They are not at liberty when they happen to be evidence against them to turn round and deny the character the ship has assumed for their benefit.[1]

Established rule is that when the owners agree to take the flag and pass of another country they are not permitted, as matter of convenience, in case of capture, to change the position they have voluntarily chosen, but others are allowed to allege and prove the real character of the vessel. Meaning of the rule is that the ship is bound by the character impressed upon her by the authority of the government from which all her documents issue ; and Chancellor Kent says this rule is necessary to prevent the fraudulent mask of enemy's property.[2] Adopting that rule, Dr. Lushington held, in the case of *The Industrie*,[3] that the share of a neutral in ownership, though purchased before the war, was subject to condemnation equally with the shares of enemies in the same ship. Principle of the decision is that whoever embarks his property in shares of a ship is in general bound by the character of the ship, whatever it may be, and that principle is as applicable to a citizen, after due notice and reasonable opportunity to dispose of his shares, as to a neutral.[4]

6. Decision of Lord Stowell, in the case of *The Mercurius*,[5] was that violation of blockade by the master affects the ship, but not the cargo, unless it is the property of the same owner, or unless the owner of the cargo was cognizant of the intended violation.

Proofs show that the cargo in this case was the property of the same owners, and, therefore, the case being within the principle of that decision, the cargo must follow the fate | of the ship. Subsequent cases, however, p. 411
decided by the same learned judge, appear to have carried the rule much further, and to have established the doctrine in that country that when the blockade was known, or might have been known, to the owners of the cargo at the time when the shipment was made, the master shall be treated as the agent of the cargo, as well as of the ship, and that the former, as well as the latter, is liable to capture and condemnation.[6]

Latest reported decision in that country is that of *Baltazzi* v. *Ryder*,[7] which was heard on appeal before the privy council, and the determination, both in the admiralty court and in the appellate court, was that where the cargo belonged to the same owners as the ship, the owners of the cargo, as well as the ship, were in general concluded by the illegal act of the master.

[1] Story on Prize, 61 ; The Elizabeth, 5 C. Robinson, 3 ; The Fortuna, 1 Dodson, 87 ; The Success, Id. 132.
[2] 1 Kent's Com., 11th ed. 91.
[3] 33 Eng. Law & Eq. 572.
[4] The Primus, 29 Eng. Law & Eq. 589.
[5] 1 C. Robinson, 80.
[6] The Alexander, 4 C. Robinson, 94 ; The Adonis, 5 Id. 259 ; The Exchange, 1 Edwards's Adm. 39 ; The James Cook, Id. 261.
[7] 12 Moore's Privy Council, 183.

Giving full effect to the admissions in this case, the appellant shows no just ground for the reversal of the decree made by the District Court.

7. Since the appeal was entered in this court the other partners have filed a petition here, asking leave to intervene for their interests, and claiming the other five-sixths of the vessel and cargo. They were not parties in the court below, having never appeared in the suit or made any claim whatever, and of course did not, and could not, appeal from the decree. Substance of their excuse for not appearing in the District Court is that they were residents in a State hostile to the United States, and consequently that they had no standing in that court, by reason of such disability. Statement of the petition also is that those disabilities continued till after the case was removed into this court by appeal; but they allege that since that time they have severally received the pardon of the President for all pains and penalties incurred for breach of blockade, and for all offences committed by them in the rebellion, and by reason of the premises they pray that their proportion of the proceeds
p. 412 of | the sale of the steamer and cargo may be restored to them. Irrespective, however, of any question which might otherwise arise as to the effect of the pardon, it is quite clear that the case is not properly before the court. Settled rule in this court is that no one but an appellant in such a case can be heard for the reversal of a decree in the subordinate court.[1]

8. Appellees are always heard in support of the decree, but they cannot have any greater damages than were assessed in the court of subordinate jurisdiction. Intervenors here, however, are neither appellants or appellees, as they did not appear as claimants in the District Court, and were not in any way made parties to the litigation. Original jurisdiction in prize, as well as in all other admiralty causes, is vested exclusively in the district courts. Property captured, where appeals are allowed to the Circuit Court, follows the cause into that court, but it does not in any case follow the cause into this court, because this court has no original jurisdiction in such cases.[2]

Evidently the application in this case is in its nature original, and not appellate, and it is well settled that this court has no original jurisdiction in prize causes.[3] Such an application cannot be first presented in this court and allowed, because it would be assuming jurisdiction not granted either by the Constitution or the laws of Congress.

Petition of intervention is dismissed, and the

DECREE OF THE DISTRICT COURT AFFIRMED.

[1] Harrison *v.* Nixon, 9 Peters, 484; Canter *v.* Am. Ins. Co., 3 Id. 318; Stratton *v.* Jarvis, 8 Id. 4; Airey *v.* Merrill, 2 Curtis's C. C. 8; Allen *v.* Hitch, 2 Id. 147; Buckingham *v.* McLean, 13 Howard, 150.

[2] Jennings *v.* Carson, 4 Cranch, 2; The Collector, 6 Wheaton, 194.

[3] The Harrison, 1 Wheaton, 298; Marbury *v.* Madison, 1 Cranch, 173.

The Sir William Peel.

(5 Wallace, 517) 1866.

1. Regularly, in cases of prize, no evidence is admissible on the first hearing, except that which comes from the ship, either in the papers or the testimony of persons found on board.
2. If upon this evidence the case is not sufficiently clear to warrant condemnation or restitution, opportunity is given by the court, either of its own accord or upon motion and proper grounds shown, to introduce additional evidence under an order for further proof.
3. If, preparatory to the first hearing, testimony was taken of persons not in any way connected with the ship, such evidence is properly excluded, and the hearing takes place on the proper proofs.
4. If a ship or cargo is enemy property, or either is otherwise liable to condemnation, the circumstance that the vessel at the time of capture was in neutral waters, would not, by itself, avail the claimants in a prize court. It might constitute a ground of claim by the neutral power, whose territories had suffered trespass, for apology or indemnity. But neither an enemy, nor a neutral acting the part of an enemy, can demand restitution of captured property on the sole ground of capture in neutral waters.
5. Where several witnesses stated facts which tended to prove that a vessel was in the employment of an enemy government; and that part, at least, of her return cargo was in fact enemy property; while the statements of others made it probable that the vessel was in truth what she professed to be, a merchant steamer, belonging to neutrals, and nothing | more; that her outward cargo p. 518
was consigned in good faith by neutral owners for lawful sale; that the return cargo was purchased by neutrals, and on neutral account, with the proceeds of the cargo or other money; the court directed restitution, without costs or expenses to either party as against the other.

Appeal from the decree of the District Court for the Eastern District of Louisiana, respecting the steamship Sir William Peel and cargo, which had been captured September 11, 1863, at the mouth of the Rio Grande, on the Mexican side, as it seemed, thereof, by the United States war vessel Seminole, during the late rebellion, and libelled in the said court for prize of war.

A claim to the vessel was put in by Corry & Laycock, of Manchester, England; and for the cargo, by Henry & Co., of the same place.

On the examination *in preparatorio*, the only persons on board the ship who were examined were the master, mate, and one seaman. From these, the charter-party on board, and a survey of the vessel, it appeared that the vessel had been sold 24th April, 1863, by certain persons, British subjects, who had bought her a week before, to Corry & Laycock; that the vessel (one of 1500 tons burden) had been built in 1855 as a war vessel for the Portuguese government, and at the time of the sale had been employed in the British transport service; that her marine engines were six feet below the water line; that three days after the sale, *i.e.*, on the 27th April, the new purchasers chartered her to Duranty & Co., 'for the

conveyance of lawful merchandise between Liverpool and Mexico and any other lawful ports; *the vessel not to attempt to break any blockade. No injurious cargoes to be shipped* as ordered by the charterers;' that Henry & Co. had shipped upon her a general cargo; gambier, sumac, boots in cases, bar, wrought, and hoop iron, baled goods, and a number of axes; that the vessel began to unlade and relade at the same time. When captured she had on board her a keg (25 lbs.) and a flask of gunpowder, 72 cannon cartridges, 48 rifle cartridges, 24 blue lights, 16 rockets,
p. 519 47 muskets ready for action, 4 boarding pistols, 11 tomahawks | for boarding, 46 boarding cutlasses, and several other military accoutrements placed in the companion-way or in a room amidships; also among the dunnage, partly hidden, a lot of solid round shot, and a quantity of grape-shot loose, and between decks two casks of iron rings used for artillery harness. These articles, it was testified by one or more of the persons above mentioned, had been on the ship when in the transport service, and had followed her as she passed to the new owners. The captain testified that there was 'no other warlike material aboard; that when the vessel was loaded at Liverpool everything like contraband had been excluded; and that Corry & Laycock owned the ship, and Henry & Co. the cargo; that all the owners were Englishmen, and had always lived at home; that the voyage was from Liverpool to Matamoras and back; that the outward cargo was to be delivered to Milmo & Co., a firm of Matamoras, for the benefit of Henry & Co.'

It appeared also, from the testimonies just mentioned, that the vessel cleared from Liverpool direct to Matamoras, but had stopped, as the mate testified (the captain saying nothing about this), at Jamaica to take in coal; and that she arrived at the mouth of the Rio Grande, the dividing river between Mexico and the United States, June 24, 1863, and anchored well on the Mexican side; that she began to unlade her outward cargo and to take a return cargo of cotton at the same time; the outward cargo being discharged in lighters and taken by steam from thence to Matamoras, about thirty miles from the mouth of the river; the return cargo of cotton being brought down in lighters and so put on the Sir William Peel; and that, about 950 bales being on board, the vessel was captured. That the ship's papers had been given to her consignees at Matamoras, and were therefore not on board, the vessel not being yet fully laden or ready to return.

In addition to this testimony of the captain, mate, and seaman, the testimony of two other persons, loyal citizens of the United States, one resident in Brownsville, a place in the State of Texas, and then in posses-
p. 520 sion of the Confederacy; | the other a mate of a merchant vessel of New York, then at anchor near the Peel, was taken, *in preparatorio*, along with that of the witnesses from the ship. The testimony of these witnesses

went to prove that the rebel authorities or rebel citizens were interested in the vessel and the cargo both outward and return.[1]

On the case coming to hearing, the court, on motion of counsel of the captors, excluded the testimony of such of the witnesses as were not found on board the captured vessel, but subsequently gave leave to both parties to take further proofs. Further testimony, including that of one of the persons whose evidence had been excluded, as taken *in preparatorio*, was accordingly taken on both sides. It was contradictory.

On the one hand it was testified that the consignees, Milmo & Co., of Matamoras, had the general reputation of being agents of the Rebel Confederacy, that they had a branch house in Brownsville, nearly opposite, in Texas, and were engaged in receiving cargoes from Europe which they disposed of to the military authorities of the Confederacy, receiving and lading, in return, cotton which the Confederacy had seized, and over which it exercised the right of property.

One witness of the captors said :

'I crossed over (from Texas to Mexico) between five and six hundred bales, Confederate cotton, that was to go on to the Sir W. Peel, but I cannot swear that it went on board her.' . . . 'This cotton had been turned over by a Confederate States agent to Milmo & Co., for account of the Confederate government. . . . Milmo & Co. hurried me up, as they were anxious to ship it on the Sir W. Peel.' 'I shipped the cotton even during nights and on Sundays.' 'I was fully confident at the time that this cotton was shipped for the Peel, and had no doubt of it whatever.'

Another witness of the captors, resident for many years in Brownsville and its vicinity, testified : |

'It was generally known in Matamoras that the Peel was at the mouth of the Rio Grande. This public notoriety was as to her size ; second, as to the cargo she had ; and third, as to the disposition to be made of that vessel after leaving the port of Matamoras. Her size was unusual for a vessel in those waters ; her cargo, comprising arms and munitions of war. It was the general rumor that she was to receive her cargo of cotton, go to Havana and Nassau, and there discharge her cargo, and then become a privateer. I very often met with Texan and rebel officers. I remember two with whom I had conversations with regard to the Peel. The adjutant, Dr. Riley, at the time of the seizure of cotton by the Confederacy, told me, when I inquired of him the cause of this impressment of cotton, that certain vessels had arrived from England belonging to parties with whom he had contracts, and they found it necessary to impress cotton if they were to receive these cargoes ; accordingly the cotton was impressed, in order that they could receive these cargoes. p. 521

[1] For the suspicious character of all the trade between neutrals and Matamoras, see the statement of the case in The Peterhoff, *supra*, and the chart, *supra*, p. 1663.

'The Sir William Peel was spoken of in connection with these cargoes in a conversation with J. K. Spear, quartermaster's clerk in Brownsville, in reference to the amount of arms the people of Western Texas had. He stated that they received all the arms they desired from vessels at the mouth of the Rio Grande, and that for a week previous he had been engaged in crossing arms for the quartermaster. I inquired of him where he had the arms from, whether from the Mexican shore or direct from the Gulf. He answered he got them in both ways, direct from vessels and from the other side, the Mexican shore. At the same time he stated that a particular friend of his was interested in the Sir William Peel, and that he had been receiving goods from the Sir William Peel.'

On the other hand, the testimony of one of the partners of the firm of Milmo & Co. was as follows:

'The vessel belonged and still belongs to Messrs. Corry & Laycock, merchants, living in Manchester, England, and British subjects.

'The cargo on board the vessel when captured, was and is the *bonâ fide* property of Henry & Co., residing in Manchester, British subjects, purchased by us in this port for them; the cargo landed here belonged
p. 522 to the same parties. I derive this knowledge | from the consignment, and *correspondence* relative to the consignment of the said cargo to us, by the said Henry & Co. Their ownership was absolute and exclusive of all other interest.

'We had full instructions to invest the entire proceeds of the inward cargo in cotton, and to fill up the Sir William Peel for Liverpool. If the proceeds did not furnish cotton enough, then to take any freight offering for that port, sufficient to load the vessel at the ruling rate of freight. We accordingly had ready for the Sir William Peel, three thousand bales of cotton, the quantity thought to be necessary to fill her. Our instructions also directed us to give her as quick despatch as possible for Liverpool; and her cargo was engaged for, and the nine hundred and four bales on board were destined for that port.'

The instructions referred to by this witness were not produced.

The further proofs showed that there was machinery aboard, apparently not on the manifest, which had been landed; bales of blankets, &c., &c., and also tended to show that the vessel when first anchored, was in American water; but that she had shifted her position to the spot at which she was captured.

The testimony as a whole, satisfied the mind of the court below that the vessel was captured when anchored south of the line dividing the waters of the Rio Grande, and when, therefore, she was in neutral waters. On that ground, it decreed her restitution; but entertaining grave doubts as to the object of her voyage, 'so grave, indeed, that but for this consideration that she was captured in neutral waters, the court should have decreed her condemnation, it ordered that the costs and charges consequent upon the capture, be paid by the claimants, and that damages be refused.' Both parties appealed.

Messrs. Evarts and Marvin, with whom was Mr. A. F. Smith, for the claimants :

I. The order made in the court below, granting to the captors time to procure further evidence, was improper ; the captors not being entitled, under the circumstances of | the case, to any such order ; and, particularly, p. 523
not entitled to an order granting them leave to produce further proof in the case generally, without specifying any particular matter or point to which the further proof should be directed.

The evidence to acquit or condemn, with or without costs or damages, must, in the first instance, come merely from the ship taken, viz., the papers on board, and the examination, on oath, of the master and other principal officers. If there do not appear from thence ground to condemn as enemy's property, or contraband goods going to the enemy, there must be an acquittal, unless from the aforesaid evidence the property shall appear so doubtful that it is reasonable to go into further proof. The claimant is often allowed to supply further proof of his neutral ownership. The captor is rarely allowed to produce other proof than what is furnished by the ship's papers, and the testimony of persons on board ; and when he is allowed to produce further proof, the order should confine such proof to a particular point or matter.[1]

We assert, therefore, that the cause shall be heard and decided in this court, as it ought to have been in the court below, upon the claim itself, upon the papers found on board the vessel, and the depositions of the master and persons on board the vessel at the time of the capture ; that is to say, in this case, of the master, the mate, one seaman, and none others.

On these testimonies it is impossible to find justification even of seizure.

II. (*Mr. Evarts.*)—1. The claimants in this case are *neutrals*, subjects of Great Britain, and as such have a *persona standi* in the prize court to allege, according to the regular procedure of the prize jurisdiction, whatever is pertinent and significant on the question ' of lawful prize of war,' under the law of nations, as bearing upon the sentence of restitution or condemnation to be passed in the cause. Whenever, | therefore, upon p. 524
the contestation of these competent litigants, any fact appears to the court exhibiting the capture to be unlawful and void, that fact is to have its consequence in a sentence of restitution, as necessarily as upon any other form of presentation to or cognizance by the court of the fact in question. It is impossible for the court to *ignore* such fact, for it is alleged and proved by a litigant, to whom it is open to allege and prove whatever is pertinent and is true, bearing upon the question of prize or no prize. If the fact thus before the court, under the rules of the law of nations,

[1] Letter of Sir William Scott and Sir John Nicholl to John Jay, 1 Robinson, 389 ; The Sarah, 3 Id. 330 ; The Haabet, 6 Id. 54 ; The George, 1 Wheaton, 408.

requires the restitution of the prize, sentence of condemnation cannot pass without a violation of the law of nations.

2. The Sir William Peel with her cargo, when lying at anchor within the neutral territory of Mexico, was captured, in violation of the *absolute* immunity from belligerent visitation, search, or capture, enjoyed by neutral property within neutral territory.

Upon this fact appearing, the capture is, by the law of nations, illegal and void, carrying no rights to the captors, involving the neutral property or its neutral owners in no amenability to the prize jurisdiction on the merits, and exposing the captors to exemplary damages from the justice of the prize court, and to personal punishment from their belligerent government, which their misconduct has compromised with the neutral nation of the injured neutral owners, not less than with the neutral nation whose territory has been violated.

As between belligerents, the rights of war are substantially measured by their power. But as between neutrals, the mere power of the belligerents carries no right whatever. The whole scope and measure of the rights of a belligerent towards neutrals, are determined by the conceded or adjusted rules and limits of interference fixed by the law of nations. These rules and limits relate either to the theatre or region within which *any rights whatever* are conceded to the belligerents towards neutrals, or to the restrictions upon such rights *within the theatre or region where, to any degree,* such rights are conceded. |

p. 525 By the law of nations, within the region invaded by this belligerent capture, *the belligerent had no right whatever* as towards or against neutral nations, nor the property of their subjects. 'The rights of war,' says Mr. Wheaton, 'can be exercised only within the territory of the belligerent powers, *upon the high seas,* or in a territory belonging to no one. Hence it follows that hostilities cannot lawfully be exercised within the territorial jurisdiction of the neutral state which is the common friend of both parties.' [1]

'The maritime territory of every state extends to the ports, &c. The general usage of nations superadds to this extent of territorial jurisdiction a distance of a marine league, or as far as a cannon-shot will reach from the shore, along all the coasts of the state. Within these limits, its rights of property and territorial jurisdiction are absolute, and exclude those of any other nation.' [2]

Every exercise of belligerent right, whether of visitation, search, or capture, within neutral territory, is absolutely unlawful, and every capture within such territory is absolutely void. 'There is no exception to the rule, that every voluntary entrance into neutral territory, with hostile purposes, is absolutely unlawful.' [3] 'All captures made by the belligerent

[1] Dana's Wheaton, § 426. [2] Id. § 171. [3] Id. 429.

within the limits of this (neutral) jurisdiction are absolutely illegal and void.' [1] 'When the fact is established,' says Lord Stowell, 'it overrules every other consideration. The capture is done away; the property must be restored, notwithstanding it may actually belong to the enemy; and if the captor should appear to have erred wilfully, and not merely through ignorance, he would be subject to further punishment.' [2]

The government of the United States, in the most definite and vigorous manner, and in the most public and authentic form, recognized these limitations of belligerent rights, and enjoined upon our cruisers a strict observance of them, | under penalty of its displeasure. Upon a suggestion p. 526
from the British minister, that the cruiser Adirondack had pushed the chase of a British vessel within the line of neutral maritime jurisdiction, the Secretary of State, under date of August 14, 1862, communicated to the Secretary of the Navy the views of the government in the following terms:

'The President desires that you ascertain the truth of this fact with as little delay as possible, since, if it be true, the commander of the *Adirondack has committed an inexcusable violation of the law of nations, for which acknowledgment and reparation ought to be promptly made.* To guard against any such occurrence hereafter, the President desires that you at once give notice to all commanders of American vessels of war, that this government adheres to, recognizes and insists upon the principle that the maritime jurisdiction of every nation covers a full marine league from the coasts, and that acts of hostility or of authority within a marine league of any foreign country, by any naval officer of the United States, are strictly forbidden, and will bring upon such officer the displeasure of his government.' [3]

Indeed, the *commission* to cruisers, by the law of nations and by the practice of our government, accepts and enforces these limitations on belligerent rights towards neutrals. Thus, the 'instructions to private armed vessels,' during the last war with Great Britain, enforced this limitation:

'The *tenor of your commission*, under the act of Congress, entitled 'An act concerning letters of marque, prizes, and prize goods,' a copy of which is hereunto annexed, will be kept constantly in your view. The *high seas*, referred to in your commission, you will understand generally to refer to low water mark, *but with the exception of the space within one league, or three miles, from the shore of countries at peace both with Great Britain and with the United States.* You may, nevertheless, *execute your commission* within that distance of the shore of a nation at war with Great | Britain, and even upon the waters within the jurisdiction p. 527
of such nation, if permitted so to do.' [4]

[1] Dana's Wheaton, § 428.
[2] The Vrow Anna Catharina, 5 Robinson, 18, cited and approved, Dana's Wheaton, § 429.
[3] Lawrence's Wheaton, n. 215, p. 715.
[4] Wheaton on Captures, Appendix, 341.

Accordingly, the Secretary of the Navy, in a communication to the Secretary of State, in answer to the remonstrance of the British minister against the violation of the law of nations by this and other captures in neutral waters, as made known to the Secretary of the Navy by the Secretary of State, expressly disclaims either the right or the purpose to make such captures. He said :

' I do not understand our government to claim the right of, &c., *nor the right of capturing ships in Mexican waters*, or in any neutral waters.'

' It is not improbable that the commanders of some of our cruisers in the Gulf are not accurately informed of the extent of the national rights herein referred to, and the department will lose no time in placing the matter properly before them.' [1]

3. As, then, the capture was made in the neutral waters of Mexico, and upon that mere statement, was—

(*a*) In excess of the cruiser's commission from our government ;

(*b*) In excess of exercise of belligerent rights, conceded and submitted to by the neutral nation whose subjects are the owners of the captured property ;

As it had been—

(*a*) In terms ' strictly forbidden ' to our cruisers, and brings upon the captors ' the displeasure of the government ; '

(*b*) Pronounced by the government ' an inexcusable violation of the law of nations, for which acknowledgment and reparation ought to be promptly made— '

The vessel and cargo are not lawful prize of war, and the decree of restitution must be affirmed.

The prize court is but a judicial scrutiny or inquisition, in behalf of
p. 528 the government, to ascertain and adjudicate | whether the *res* is subject to condemnation, as captured within and in pursuance of the belligerent right of the government, conformably to the law of nations.

When the contrary appears, restitution follows, and in no case can the treasury be enriched, and the captors rewarded, by condemnation, when the capture is ' an inexcusable violation of the law of nations, for which reparation must be promptly made,' and brings upon the captor ' the displeasure of his government,' provided this character of the capture is before the prize court.

4. It is submitted that no case can be found in which the property of *neutral claimants*, admitted to allege and prove the invalidity of a capture in neutral waters, has been condemned. The case of *The Lilla* (in Sprague's Decisions),[2] in the District Court of Massachusetts, is no exception to this proposition. The court held the *fact* not made out, and

[1] Mr. Welles to Mr. Seward, March 5, 1864, Diplomatic Correspondence, p. 548.
[2] Vol. ii, p. 177.

the very brief observation of the court, that, if made out, the objection was not open to the neutral claimant, was but *obiter*.

5. The rule, supposed to be established, and the cases in support of it, that, though actual enemy property captured in neutral waters is not good prize, and must be restored, upon that fact appearing, yet the enemy owner cannot be heard to make the objection, but only the neutral nation whose waters have been entered, rest upon the reason that *no* wrong can be done to an *enemy*, and *no* allegation can be heard in *his* behalf. In other words, that in the case of enemy's property, the fact of invalid capture cannot come before the prize court, except upon the representation of the neutral nation. 'It is a *technical rule* of the prize courts,' says Mr. Wheaton, 'to restore to the individual claimant, in such a case, only on the application of the neutral government whose territory has been thus violated. This rule is founded upon the principle that the neutral state alone has been injured by the capture, and that the *hostile claimant has no right to appear for the purpose of suggesting the invalidity of the capture.*' [1]

The *Anne*,[2] the only case in this court upon the question, was of an p. 529
enemy ship, and so far from disturbing, confirms the position contended for in behalf of neutral claimants. 'A capture made within neutral waters,' said Story, J., in that case, 'is, *as between enemies*, deemed, to all intents and purposes, rightful.' '*The enemy has no rights whatsoever;* and if the neutral sovereign omits or declines *to interpose a claim*, the property is condemnable, *jure belli*, to the captors.' This case is subject to the further criticism, as an authority on this point, that the facts show, and the court so hold, that the protection of neutrality had been forfeited by the captured ship having commenced hostilities against the captor, so that no claim by the neutral sovereign could have been interposed.[3]

The *Richmond*,[4] was the case of a municipal forfeiture of a vessel of the United States, the seizure having been made in St. Mary's River, within the Spanish territory of Florida.

On such a case, it is obvious that the violation of Spanish territory could never come in issue, judicially, nor could it in anywise protect the vessel against the municipal justice of its own government.

Upon an examination of the decisions of Sir William Scott, it will be found that the cases in which condemnation has passed, for want of the intervention of the neutral government, have been upon actual enemy's property where no claimant could appear.

III. If, however, this neutral property represented by neutral claimants, shall be held amenable to the prize jurisdiction upon the merits, it is apparent that neither the vessel nor the cargo captured is good prize of war.

[1] Dana's Wheaton, § 430.
[2] 3 Wheaton, 435.
[3] Id. 447–8.
[4] 9 Cranch, 102.

1. As to the VESSEL.

Its sincere and permanent neutral ownership is unquestionable, either upon the preparatory, or the further proofs. The 'general rumors to the contrary come to nothing in the face of the positive testimony.

p. 530 It had violated, or attempted to violate no blockade. | Matamoras could not be, and Brownsville was not, blockaded.[1]

The Navy Department expressly excluded Brownsville from the blockade of Texas. 'The whole coast of Texas, *except such part as may be necessary for access to the port of Brownsville*, is to be regarded as under blockade.'[2]

If its inward cargo included any contraband, it had all been landed before the capture, and so the ship was free from interference on that ground.

But if contraband had been found on board, the *ship* would not have been involved in condemnation therefrom. There was no connection between the ship or its owners and the cargo or its owners, except that of carriers under the charter-party.

But further. Upon the proofs it is impossible to contend that contraband formed any part of the inward cargo.

Again. If any part of the inward cargo was contraband in its nature, as the voyage was between neutral ports in its project, and was consummated by the delivery of the whole cargo at Matamoras, no offence is predicable of a trade in contraband not seeking an enemy port.

2. As to the CARGO.

The inward cargo captured was neutral property, and was not contraband.

Its value was so trivial as to deserve little attention, and the outward cargo consisted of 904 bales of cotton, and as it was not contraband in its nature, and, whatever its nature, it could not be contraband from its outward destination; as, besides, it was not being exported in violation of blockade, it can be condemned only *as enemy property*.

Upon the proofs it is impossible to contend that any imputation goes beyond the fact, that some undesignated and unmeasured part of this cotton *had been*, before lading, enemy property. But as trade by neutrals with the enemy, and the purchase of enemy property, except in violation

p. 531 of blockade, | are wholly lawful, no consequence of condemnation, *from enemy origin*, can be pretended.[3]

Finally. The capture was wholly unjustifiable, and the restitution decreed should have been attended with damages and costs.

The innocence of the vessel and her voyage and cargo, was apparent

[1] See The Peterhoff, *supra*.
[2] Mr. Welles to Mr. Seward, Diplomatic Correspondence, 1864, Part II, 548.
[3] The Bermuda, 3 Wallace, 557.

upon visitation, and there was no justification for suspicion or surmise to their prejudice.

When captors thus intercept an open prosecution of an apparently lawful trade, and visitation exhibits every trait of honest neutrality, and the commerce thus indicated is not only lawful, but is constantly engaged in by our own vessels, the integrity of the prize courts demands the infliction of damages and costs as a check to the speculative cupidity of captors.

The features of this case are not distinguishable from those of *The Labuan*, intercepted in her trade at Matamoras, and brought into New York. She was promptly restored, the diplomatic claim for damages immediately recognized, and an adjustment proceeded with.[1]

The decree of restitution should be affirmed, and the decree charging the claimants with costs and refusing them damages, should be reversed.

Mr. Ashton, Assistant Attorney-General for the United States, and Mr. Eames, for the captors, contra :

I. We could argue, perhaps, that the testimony of all the witnesses taken *in preparatorio* might, in the discretion of the court, have been well received in furtherance of justice. One of them was a person stationed on a New York vessel, temporarily in the harbor, and could not be subsequently procured. We need not so argue. But undoubtedly the further proofs must be heard. There was enough in the mere character of an armed vessel to excite suspicion, even if the court had no right to *look at* all the depositions. |

II. The locality of the capture, admitting it to have been made in p. 532
Mexican waters, is unimportant. Mexico makes no remonstrance; in no way objects. We admit the ingenuity and force also of the opposing argument made by Mr. Evarts. But all the authorities agree that capture within neutral territory can only be averred in support of a claim for restoration by the accredited agent of the government whose neutral immunity had been thus infringed. Neither the enemy claimant, who has no standing in the prize courts, nor the citizen claimant, who has made his property liable to condemnation in prize for unlawful trading with the enemy, nor the neutral claimant, who, at the time of capture, is found in the predicament of having laid aside his neutral character, and having, by unneutral conduct, made himself *pro hac vice* an enemy, can set up for defence against decree of condemnation so incurred, the fact of capture within neutral limits. No case has been or can be produced giving warrant for such allegation. All the adjudged cases state, with equal explicitness and emphasis, first, that the claim of neutral immunity, when properly pleaded by the aggrieved neutral government, is conclusive and effectual in all cases as a defence against a decree of condemnation,

[1] Diplomatic Correspondence, 1863, Part I, p. 476, Lord Lyons to Mr. Seward.

and, secondly, that such claim on such ground can be made only by and in behalf of such government whose territorial rights have been infringed.

In *The Purissima Concepcion*,[1] the leading British case upon the subject, Lord Stowell stated, in the plainest words he could use, that 'it is a known principle of this court that the privilege of territory will not itself enure to the protection of property, unless the state from which that protection is due steps forward to assert the right.'

The same doctrine is maintained in the other British cases,[2] and in *The Anne*, in our own.[3]

p. 533 In no one of these cases does the court attempt to make | any distinction between the case of a captured non-combatant *enemy* and a captured *neutral* who has forsaken his neutrality, and by his conduct made himself liable to be captured and condemned as an enemy.

The order issued by the Navy Department to our naval vessels on the 14th of August, 1862, prohibiting the capture of any vessel within the territorial waters of a friendly nation, has no application to a case like this, where the captors proceeded upon the best observations which could be made, and so determined the position of the prize to be such as to make her capture not only lawful, but obligatory upon them in the performance of their duty. The order is intended to protect the territorial immunity of neutral nations, and not to save blockade-runners and contrabandists, in doubtful positions near the neutral line, from the lawful and rightful penalty of their conduct.

III. The testimony brings out the fact made known in other cases, that the whole system of traffic during our rebellion between Matamoras and the British ports, was but a fraudulent pretence of honest and legitimate neutral trade, and that the plan and scheme of the voyages were organized with the purpose of concealing enemy property, and in a manner peculiarly offensive both to the belligerent and the sovereign rights of the United States.

As matter of public law, any neutral vessel engaged and arrested in the prosecution of a traffic so suspicious and demoralizing as that with a neutral along the line of a river on which lay a blockaded and suffering enemy, should be held in a prize court to conclusive proof of her innocence. In the absence of such proof, the inference must be that she is guilty.

The selection of a steamer of the size, strength, and armament of the Peel for the Matamoras trade; the touching at Jamaica,—suppressed by the master, but confessed by the mate,—material, when the ship is afterwards found clandestinely discharging machinery, no machinery

[1] 6 Robinson, 45.
[2] The Etrusco, cited 3 Robinson, 31; The Eliza Ann, 1 Dodson, 244; The Diligentia, Id 412.
[3] 3 Wheaton, 435.

being upon the *manifest;* the universal belief at Matamoras that the vessel and cargo were owned by rebel parties, and that the former | was p. 534
not meant to return to Liverpool, but was intended, after discharging her cotton at Havana and Nassau, to be turned into a rebel privateer ; the munitions, arms, and cannon she had on board, suitable only for war service, and not at all excused, but the contrary, by the fact that they were on board when the vessel was bought ; the admissions by rebel agents that they had goods aboard ; the unexplained failure of Milmo & Co., testifying through their partner, under the order for further proof, to produce the instructions from Henry & Co. as to the disposition of the outward cargo and purchase of the return cargo ; the employment by Henry & Co., claimants, of Milmo & Co. to act as their agents, when they were the notorious and advertised commercial agents of the rebel authorities in Texas, known to have little, if any, other business than the obtaining of cotton from those authorities for exportation, as return cargo, through the port of Brownsville, where they had a branch house,—all mark a dishonest purpose on the part of those concerned in this adventure ; and the decree of restoration in the court below should be reversed, and both ship and cargo condemned.

They would, indeed, have been so but for the idea of the judge below, that the capture in neutral waters saved them ; an idea which, though so ably supported on the other side, we have shown has no foundation in law.

The CHIEF JUSTICE delivered the opinion of the court.

Regularly in cases of prize no evidence is admissible on the first hearing, except that which comes from the ship, either in the papers or the testimony of persons found on board.

If upon this evidence the case is not sufficiently clear to warrant condemnation or restitution, opportunity is given by the court, either of its own accord or upon motion and proper grounds shown, to introduce additional evidence under an order for further proof.

In the case now before us some testimony was taken, preparatory to the first hearing, of persons not found on board | the ship, nor, indeed, in p. 535
any way connected with her. This evidence was properly excluded by the district judge, and the hearing took place on the proper proofs.

Upon that hearing an order for further proof was made, allowing the libellants and captors, on the one side, and the claimants, on the other, to put in additional evidence ; and such evidence was put in accordingly on both sides.

The preparatory evidence on the first hearing consisted of the depositions of the master of the ship, the mate, and one seaman. No papers were produced, for none were found on board ; a circumstance explained by the statement of the master, that all the papers belonging to the

vessel, except the lightermen's receipts for the cargo, were with the English consul and the consignees of the ship at Matamoras.

The depositions established the neutral ownership of the ship and cargo. They proved that the Sir William Peel was a British merchantman; that she had brought a general cargo, no part of which was contraband, from Liverpool to Matamoras; that this cargo, except an inconsiderable portion, had been delivered to the consignee at the latter port; that the cotton found on board was part of her return cargo; that it was owned by neutrals, and had a neutral destination; and that the ship, when captured, was in Mexican waters, well south of the boundary between Mexico and Texas.

This proof clearly required restitution. The order for further proof was, probably, made upon the rejected depositions, which, though inadmissible as evidence for condemnation, may have been allowed to be used as affidavits on the motion for the order.

The further proof, when taken, was conflicting.

The weight of evidence, we think, put the vessel, at the time of capture, in Mexican waters; but if the ship or cargo was enemy property, or either was otherwise liable to condemnation, that circumstance, by itself, would not avail the claimants in a prize court. It might constitute a ground of
p. 536 claim by the neutral power, whose territory had suffered | trespass, for apology or indemnity. But neither an enemy, nor a neutral, acting the part of an enemy, can demand restitution of captured property on the sole ground of capture in neutral waters.

We must, therefore, look further into the case.

There is some evidence which justifies suspicion. Several witnesses state facts which tend to prove that the Peel was in the employment of the rebel government; and that part, at least, of the cotton laden upon her, as return cargo, was in fact rebel property.

There are statements, on the other hand, which make it probable that the Peel was in truth what she professed to be, a merchant steamer, belonging to neutral merchants, and nothing more; that her cargo was consigned in good faith by neutral owners for sale at Matamoras, or to be conveyed across the river and sold in Texas, as it might lawfully be, not being contraband; that the cotton was purchased by neutrals, and on neutral account, with the proceeds of the cargo or other money.

In this conflict of evidence we do not think ourselves warranted in condemning, or in quite excusing the vessel or her cargo. We shall, therefore, affirm the decree by the District Court, and direct restitution, without costs or expenses to either party as against the other.

AFFIRMANCE AND DIRECTION ACCORDINGLY.

The Pearl.

(5 Wallace, 574) 1866.

A British vessel captured during the rebellion and our blockade of the Southern coast, by an American war steamer, on her way from England to Nassau, N. P., condemned as intending to run the blockade; Nassau being a port which, though neutral within the definition furnished by international law, was constantly and notoriously used as a port of call and transshipment by persons engaged in systematic violation of the blockade, and in the conveyance of contraband of war; the vessel and cargo being consigned to a house there well known, from previous suits, to the court, as so engaged; the second officer of the vessel, and several of the seamen, examined *in preparatorio*, testifying strongly that the purpose of the vessel was to break the blockade; and the owner, who was heard, on leave given to him to take further proof, touching the use he intended to make of the steamer after arrival in Nassau, and in what trade or business he intended she should be engaged, and for what purpose she was going to that port, saying and showing nothing at all on those points.

APPEAL from the District Court of the United States for the Southern District of Florida, restoring, on payment by the claimants of expenses and costs, the steamer Pearl, captured for intent to break the blockade of our Southern coast, established during the late rebellion; the question being chiefly of fact.

Mr. Ashton, Assistant Attorney-General, for the United States, Mr. Marvin, contra, for the claimants.

The CHIEF JUSTICE, previously stating the case, delivered the opinion p. 575
of the court.

The Pearl was captured on the 20th January, 1863, by the United States ship of war Tioga, between the Bahama banks and Nassau.

The papers found on board showed that she was a British vessel, belonging to one George Wigg, of Liverpool; that he became owner on the 24th of September, 1862; that one George M. Maxted was appointed master at Glasgow, where she was purchased, on the 25th of September; that one Matthew L. Irving succeeded him on the 13th of October, also at Glasgow; and that one William Jolly was appointed in his place, at Cork, on the 22d of November. Jolly was master at the time of capture.

She carried no cargo except ten bales of seamen's jackets and cloth, shipped by Wigg at Cork and consigned to H. Adderly & Co., at Nassau, to whom the vessel was also consigned. This firm has become well known in this court as largely engaged in the business of blockade-running.

Several of the seamen, examined in preparation for the primary hearing, concurred in representing the vessel as destined to the Rebel Confederacy.

One of them was present when the vessel was purchased and heard Wigg and Maxted negotiating for her. According to them, Maxted

acted as principal rather than as subordinate, and was engaged about the same time in buying other vessels of the same class as the Pearl, of small size and light draft, and what was said impressed the witness with the belief that all of them were destined to trade with the Confederate ports.

Several other seamen made similar statements. It seemed to be a common understanding among them that the Pearl was to be engaged in running the blockade, and there was much talk about the practicability and probability of her getting into the Confederate ports, and especially the port of Charleston. 'It was notorious,' said one of them, 'in
p. 576 Glasgow and Cork, before and after the sailing of the Pearl, | that she was engaged to run the blockade, and that she was bought and fitted and sailed for that especial purpose.'

One of the firemen stated that Maxted represented to him and his mates, as an inducement to ship on the Pearl, that they might reship on her or in some vessel in the Confederate service, with large pay, and have, as a bonus, the ten pounds return-money which was to be paid them on discharge at Nassau. The same witness stated that Maxted, after leaving the Pearl, took command of a screw steamer, the Thistle, from Liverpool for Nassau.

The testimony of the second officer of the Pearl was substantially to the same effect. He was engaged at Glasgow for the general management on board, by Maxted, shortly before she sailed; and after a fortnight or more, shipped as second officer. He understood the purchase by Wigg to be made for parties in the Confederate States.

The master and the first mate testified that they knew nothing of any destination of the ship beyond Nassau. Neither knew to whom the vessel belonged, except from the papers, but believed that she was owned by Wigg. All they knew of the cargo was that it was consigned to Adderly & Co.

The cause was heard upon the preparatory evidence on the sixth of May, and on the same day, and before any decree was pronounced, a motion for further proof was made, upon affidavits by Wigg, Maxted, and several of the seamen; and on the 25th of May it was 'ordered that the claimant of the ship be allowed to produce further evidence, by his own oath or otherwise, touching his interest therein and the use he intended, at the time of the capture, to make of the vessel after her arrival at Nassau; the trade or business he intended she should be engaged in, and for what purpose she was going to that port; and that the claimant of the goods have time to produce an affidavit of his right and title therein, and to produce such other proof of neutral ownership as he may be advised.'

No new evidence at all appears to have been taken under this order;
p. 577 but the affidavits used on the notice, and a Nassau | newspaper containing

two government notices, seem to have been admitted as further proof on the final hearing.

Some of the affiants were seamen who had been examined at Key West. They denied having made some statements contained in the depositions put into the cause by the prize commissioners; but they do not deny the conversations and understandings to which they then testified. The substance of their new affidavits was that the Pearl, at the time of her capture, was on a *bonâ fide* voyage to Nassau. The affidavits of the seamen, not before examined, were to the same effect. They are entitled to very little weight as further proof.

The affidavit of Wigg was positive to his ownership; to the non-existence of Confederate ownership; and to the allegation that the Pearl, at the time of her capture, was engaged in the *bonâ fide* prosecution of a lawful voyage from Great Britain to Nassau, and that he had no knowledge or belief that any cause existed which rendered her liable to capture.

But he said nothing at all on the most important point in respect to which he was allowed further proof, namely, what use he intended to make of the steamer after arrival in Nassau; and in what trade or business he intended she should be engaged; and for what purpose she was going to that port.

The affidavit of Maxted also asserted the sole ownership of Wigg; denied that Wigg was agent for the Confederate States or connected in business with any person residing in either of them; denied that he himself made any contract with any one to run the blockade, or had any conversation with any of the seamen in relation to shipping in any vessel to run the blockade; and concluded with an averment, that of his own knowledge the steamer was purchased by Wigg to carry mails for the British government between the West Indies and Cuba, under proposals offering five thousand pounds per annum for three years.

This affidavit, if entitled to credit, might repel the inference, warranted by the other evidence, that the Pearl was purchased and sailed with intent to break the blockade. | But Maxted's own connection with the p. 578
purchase of this and other vessels, and his own engagement in the suspicious commerce with Nassau, do not allow us to regard his evidence as of much value, especially in the absence of any satisfactory affidavit from Wigg himself.

It must be remarked, also, that the government notices for proposals, put in evidence for the claimant, apparently for the purpose of supporting the statement by Maxted, do not support it at all. They invite proposals for sailing, not for steam vessels, and relate to communication among the Bahama Islands, not to communication between Cuba and the West Indies.

On the whole, we are constrained to say that we perceive no reasonable ground for believing that the Pearl was not at the time of capture destined

to employment in breaking the blockade. We are not satisfied that her voyage was to terminate at Nassau; but are satisfied, on the contrary, that she was destined, either immediately after touching at that port, or as soon as practicable after needed repairs, for one of the ports of the blockaded coast.

The vessel, therefore, in conformity with the principles recognized by us in several cases, must be condemned.

As to the ten bales of merchandise, the evidence showed ownership in Wigg, rather than any other person; but no claim was put in by him. They were claimed in behalf of Adderly & Co., by the captain; but, in his deposition, he disclaimed all knowledge of the ownership, except from the consignment. No affidavits of title or neutral ownership have been put in by Adderly & Co., under the notice obtained by the claimants, for further proof. This neglect cannot be construed otherwise than as an admission that they are not entitled to restitution.

A decree of condemnation, therefore, must pass against the merchandise as well as the ship.

DECREE ACCORDINGLY.

The Sea Lion.

(5 Wallace, 630) 1866.

1. Under the act of 13th July, 1861, which forbade all commercial intercourse between the inhabitants of a State whom the President should proclaim in a state of insurrection, and the citizens of the rest of the United States, but by which it was enacted that 'the President' might 'in his discretion' license and permit intercourse in such articles, &c., 'as he in his discretion' might think most conducive to the public interest, and that 'such intercourse so far as by him licensed' should be 'conducted and carried on only in pursuance of rules and regulations prescribed by the Secretary of the Treasury.' *Held*—
   (i) That the President alone had the right to license such intercourse.
   (ii) That a license from a 'Special Agent of the Treasury Department and Acting Collector of Customs' dated 16th February, 1863, to bring cotton 'from beyond the United States military lines,' though certifying on its face that the United States military commander of the department where the license was given, by order in the 'special agent's' hands 'approved and directed this policy,' *and indorsed 'Approved' by the rear admiral commanding that maritime station*, which license declared that cotton brought by particular persons named would 'not be interfered with in any manner, and they can ship it direct to any foreign or domestic port'—was no protection to property bearing the stamp of enemy property when captured in coming from a port of a State in insurrection and then under blockade by the government, though in a course of being brought by the particular persons, named in the license.
2. Such a license as that above mentioned had no warrant either from the Treasury regulations of 28th of August, 1861, or from those of 31st March, 1863.

AN act of Congress passed during the late rebellion (July 13th, 1861), prohibited all commercial intercourse between the inhabitants of any

State which the President might declare in a state of insurrection, and the citizens of the rest of the United States; and enacted that all merchandise coming from such territory into other parts of the United States with the vessel conveying it should be forfeited.

The act provided, however, that 'the *President*' might 'in *his* discretion *license and permit commercial intercourse*' with any such part of a State the inhabitants of which had been so declared in a state of insurrection, 'in such articles, and for such time, and by such persons, as he, in *his* discretion, may think most conducive to the public interest.' And | that 'such intercourse, so far as by *him* licensed, shall be conducted p. 631
and carried on only in pursuance of rules and regulations prescribed by the Secretary of the Treasury.'

The President having soon after declared several Southern States, and among them Alabama, in a state of insurrection, and the Secretary of the Treasury having issued a series of commercial regulations[1] on the subject of intercourse with them, Brott, Davis & Shons, a commercial firm of New Orleans, obtained from Mr. G. S. Dennison, special agent of the Treasury Department, and acting collector of customs at New Orleans, a paper, dated February 16th, 1863, as follows:

'The United States military and other authorities at New Orleans permit cotton to be received here from beyond the United States military lines, and such cotton is exempt from seizure or confiscation. An *order is in my hands from Major-General Banks approving and directing this policy*. The only condition imposed is that cotton or other produce must not be bought with specie. All cotton or other produce brought hither from the Confederate lines by Brott, Davis & Shons will not be interfered with in any manner, and they can ship it direct to any foreign or domestic port.'

This paper was indorsed by Rear Admiral Farragut, in command of the blockading force on that coast, 'Approved.' The Rear Admiral had given also the following instructions to his commander of the Mobile blockade:

'Should any vessel come out of Mobile and deliver itself up as the property of a Union man desiring to go to New Orleans, take possession and send it into New Orleans for an investigation of the facts, and if it be shown to be as represented, the vessel will be considered a legal trader, under the general order permitting all cotton and other produce to come to New Orleans.'

With the first quoted of these documents in their possession, Brott, Davis & Shons addressed the following communication, | dated March 9th, p. 632
1863, to one Worne; he being at this time a member of the firm of Oliver & Worne, who were engaged in business in New Orleans; Danes by birth:

'All cotton and other produce shipped from within the Confederate lines to our address by yourself, as our agent, will be protected by us

[1] Not set forth in the records or briefs, nor as the case was decided essentially important to be set out.

under authority from the military and naval authority of this place, dated February 16th, 1863, permitting us to receive such cargoes and to reship them to foreign ports. The original permit alluded to we herewith inclose to you.'

On accepting from Brott, Davis & Shons, the agency, Oliver & Worne proceeded to Mobile for the purpose, as such agents, to ship cotton *to some place ;* where ? was one of the questions raised.

At Mobile Worne transferred his agency to Hohenstein & Co.

These persons, upon assuming the employment passed over to them, bought a schooner, ' The Sea Lion,' of about ninety tons. And, on the oath of ' M. D. Eslava, of Mobile,' the vessel was registered under an ' act to provide for the regulation of vessels owned in whole or in part by citizens of the Confederate States,' as the property of Hohenstein & Co., ' the only owners.' On this schooner they laded two hundred and seventy bales of cotton. A small shipment (seven barrels) of turpentine was also put on board. They selected for captain a certain Netto, a Spanish subject, born in Mahon, unmarried, for four years previous to 1863 resident in Mobile, but for six years before coming there sailing on Spanish ships ; one Yokum (a partner of Hohenstein), originally of the loyal States, but after 1856 of Memphis, Tennessee, being appointed by Oliver & Worne supercargo. The crew, seven in number, were from Mobile, and all Spanish but one, he being English.

The vessel being thus ready for a voyage, Oliver & Worne gave to Yocum, the supercargo, letters of introduction to persons in *New Orleans.*

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[*Oliver to Brott.*]

May 10th, 1863.

F. Brott, Esq.,
Of Brott, Davis & Shons, New Orleans.

Dear Sir : I beg to introduce to your acquaintance Mr. N. Yocum, who visits your city on business. I recommend Mr. Yocum to your best attentions, and trust that you will assist him in his purposes, *which he will explain to you verbally.* Mr. Yocum is the senior of the firm of J. Hohenstein & Co., your agents for cotton shipments.

Trusting that lively business transactions between your respective firms may be the result of your meeting with Mr. Yocum,

I remain truly yours,

Oliver & W.

[*Same to Pilcher.*]

May 10th, 1863.

Mason Pilcher, Esq.,
President of Bank of New Orleans.

Dear Sir : By the present I beg to introduce to your acquaintance Mr. N. Yocum, who visits your city on business. I recommend Mr. Yocum to your best attention, and trust that you will please to assist him in his purposes, *which he will explain to you verbally.*

Oliver & W.

[*Worne to Pilcher.*]

May 10th, 1863.

MASON PILCHER, ESQ.

DEAR SIR: The present will be handed to you by Mr. N. Yocum, who takes out some cotton. I would write to you more fully on this subject, but *deem it advisable to let Mr. Yocum explain this transaction to you.*

He intends purchasing a steamer. If the one you had at Havana is still unsold, Mr. Yocum may buy her, if you can recommend her as thoroughly seaworthy, and in every respect in good order. I mentioned to him your price, $40,000 at New Orleans.

Your friend D. is at *Atlanta.* It was absolutely impossible for us to obtain any vessel here. Furthermore, heavy bonds were required to obtain permission to take out cargo, and he deemed it advisable to invest in some favorable enterprise in | *Georgia,*[1] temporarily, until we could p. 634 find some opportunity to do so here. He is well and sends his best regards.

Please show your best attentions to Mr. Yocum, and assist him as much as you possibly can. He is under heavy bonds to take his shipment to Havana. *You will, therefore, please to have it immediately released and cleared for that port.*

Please hand the inclosure to address, with my best compliments.

You can rely implicitly on Mr. Yocum in all he says. *It will be done faithfully.*

Truly yours, R. W.

The vessel, however, was not documented at all for New Orleans. The shipping articles, her clearance, bill of health, manifest (sworn to by the captain, Netto), all presented 'Havana, Cuba,' as the port of destination. And the vice-consul of Spain, in Mobile, certified that the goods in the manifest were the same which had been cleared from the consulate for that port.

The vessel set sail from Mobile in the daytime of the 8th May. When five miles southeast of Fort Morgan, which commands the entrance to Mobile harbor, and at about 12 o'clock, midnight, she was captured and sent to Key West, where she was libelled in the District Court for Southern Florida in prize. She had made no resistance, and all her papers, including the 'license,' were given up. Among them was this one:

MOBILE, ALA., May 8th, 1863

N. Yocum has credit on the books of J. Hohenstein & Co., $150,034, and $17,000 subject to settlement between J. Hohenstein and N. Yocum.

J. HOHENSTEIN & CO.

The captain and the supercargo were the only persons examined *in preparatorio.*

1. *As to the port of destination.*

The supercargo said that his directions from Hohenstein & Co. were

[1] A State at the time in rebellion.—REP.

p. 635 to drop down to the fleet off Mobile, supposing | that the officers of the fleet would assist them to get to the mouth of the Mississippi, where he was to communicate with Hohenstein & Co. He added, that the vessel was dropping down with the tide and did not change her course when taken.

The captain stated that when the vessel was cleared he expected to go to Havana. 'After passing Fort Morgan the supercargo, Mr. Yocum, said we would go to the mouth of the Mississippi to go to New Orleans. I should have taken her wherever the supercargo said.'

These two persons, the captain and supercargo, on the next day filed a claim for the vessel in behalf of *Brott, Davis & Shons*, swearing that the vessel was bound in good faith to the port of New Orleans, there to deliver her cargo in pursuance of the license of G. S. Denison, special agent of the Treasury Department.

Brott & Davis also made joint affidavit as '*claimants* of the schooner Sea Lion and of the cargo laden and found on said schooner.' It was read in evidence, by consent :

'That on the 16th February, 1863, they obtained from G. S. Denison, Esq., special agent of the Treasury Department, and acting collector of customs at New Orleans, a license to bring cotton and other produce from beyond the military lines of the United States, and from within the Confederate lines, into the port of New Orleans ; that the said license was approved by D. G. Farragut, Rear Admiral ; that thereupon the agents of these respondents, Messrs. Oliver & Worne, in Mobile, Alabama, acting on behalf of these respondents, loaded the schooner ; that in the latter part of March, 1863, the said agents proceeded from New Orleans to Mobile for the purpose of shipping the said cargo, and were furnished with the license from Collector Denison and Admiral Farragut, which was placed in the hands of Mr. N. Yocum, who went on board the said schooner as supercargo, and express instructions were given by claimants to their agents to bring the said schooner, with her cargo, to this port of New Orleans ; that it always was their design and intention to cause said schooner and her cargo to be brought to New Orleans and not to be taken to any other place whatsoever ; and that it was their intention
p. 636 to ship the said cargo from this port | according to law, to the best market. And they further depose that each and every member of the firm of Brott, Davis & Shons, is a loyal citizen of the United States, and that *no enemy of the United States* has any property or interest in the said schooner and cargo.'

Hubbell, also, the passenger, whose affidavit was received by consent, stated :

'That although the schooner was cleared for Havana as a necessity, and in blind, in order to get out of the port of Mobile, he understood she was going to New Orleans, and that he was bound for and expected to go to New Orleans, and that he was told by the supercargo of the said Sea Lion that it was his intention when off the bar to lay alongside of the blockading fleet in order to obtain a permit to come to New Orleans ;

that the said schooner came out of the 'swash channel,' and that when over the bar, instead of following the channel down the coast, as is the usual custom of blockade-runners, she stood out for the blockading fleet to obtain the beforementioned permit; that as evidence of the intention of the supercargo to place the said schooner in the hands of the blockading fleet, he took her out when the wind was very light, so that she was not able to sail over two knots an hour, and that it was with difficulty he induced the pilot to take her out with such a wind; that the schooner hove to on hearing the first gun from the blockading fleet, and awaited being captured.'

2. *As to the ownership of the vessel and cargo.*

In the claim to the vessel, interposed by the captain and supercargo, Netto and Yocum, both captain and supercargo swore that, as they were '*informed and believed*,' the vessel and cargo were the property of Brott, Davis & Shons, and that no enemy of the United States had any property or interest therein; and on the examination in preparation the supercargo said:

'I believe that Oliver & Worne and Brott, Davis & Shons, are owners of the schooner. I only know them to be owners by their own representations and by their having the management of her. I believe they own the cargo. The spirits of turpentine | belonged to the crew. I have p. 637
no interest. I was to receive $500 as supercargo.'

On the same examination the captain said:

'The cotton, I think, belonged to Brott, Davis & Shons. The supercargo told me it so belonged. I did not know anything more about its ownership. It was to be delivered wherever the supercargo said.'

A certificate from the military governor of Louisiana, read by consent, stated that the firm of Brott, Davis & Co. were well known to him 'as *unconditionally loyal.*'

The District Court condemned the vessel.

Messrs. W. M. Evarts and Henry Flanders, for the claimants, appellants in the case:

I. *As to the facts.*

The evidence establishes, we submit—

1. That the cargo and vessel were the property of loyal citizens of the United States.

2. That the voyage was authorized by the civil and naval authorities of the United States, and was undertaken solely with the view of giving up the vessel and cargo to the blockading fleet, in accordance with such authorization.

3. That the permit in favor of the claimants was employed in good faith.

The evidence as meant apparently to be relied on in support of the decree below, points to two matters only as giving the case a bad aspect.

1. An argument will perhaps be made against the claimants from the documented character of the vessel. But Worne, acting for Brott, Davis & Co., necessarily employed as agents, such persons as could be useful in the business about which they were employed. Embarked in a transaction such as this was, 'compelled,' in the language of Lord Stowell, applied to persons similarly situated, 'to pick their way in fear and silence,' walking, as it were, at every step, over burning ploughshares, these agents had necessarily to | employ great caution and a certain amount of subterfuge. 'This,' said Lord Stowell, in a case like this,[1] 'is not very much matter of surprise or of serious judicial animadversion.' They were obliged, *in order to accomplish their agency*, to deceive the enemy. That, of course. If they had avowed their purpose, proclaimed that the vessel and cargo were the property of loyal citizens of the United States, and documented the vessel in accordance with the facts, it is easy to perceive that both agents and agency would have been strangled in the outset. The master and crew believed that they were destined on a voyage to Havana; the Confederate military and civil authorities believed the same thing. On that belief alone could the vessel have obtained her clearance. That all this was a deception, and that the real destination was New Orleans, the testimony of Mr. Hubbell, a witness above all question, makes certain.

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There is no motive that can be well suggested or conceived that could induce the claimants or their agents to act a part that was not open, fair, and consistent with the main and avowed design. They wished to bring out from Mobile this cargo of cotton, and being authorized to do so, they had no motive to evade the blockade. Their only concern was to get safely past the hostile batteries and place their property under the protection of the blockading fleet. There was no spoliation of papers or cargo, no attempt at resistance or escape; but an open, voluntary surrender.

2. An argument may be attempted from the memorandum as to the $150,034, and from Yocum's letters of introduction.

The former was simply an acknowledgment, on the part of J. Hohenstein & Co., that Yocum had credit on their books for $150,000, subject to settlement between the partners. As to the letters, it is, so far as this case is concerned, of no sort of importance what purposes Mr. Yocum had in view at New Orleans. The letter to Mr. Pilcher relates to Mr. Yocum's business and purposes, and not to the business | and purposes of Brott, Davis & Shons. It is true, Mr. Pilcher is informed that Yocum is under heavy bonds to take his shipment to Havana, and he is requested to have it released and cleared for that port. The meaning is easily explained: In order to get this cotton out of Mobile, the civil and military

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[1] The Goede Hoop, Edwards, 327.

requirements of the port had to be complied with. Among others, a bond had to be given that it should be taken to the asserted port of destination. The letter means to say, that if it should be understood in Mobile that the cargo was taken to New Orleans, and there protected, Yocum's bondsmen would be prosecuted for the penalty. Hence the anxiety for the reshipment of the cotton to Havana.

3. The fact that the departure from Mobile was so timed as to bring the Sea Lion out to sea at *night*, argues nothing against fair purpose. The vessel had, of necessity, to escape under cover of the darkness. Does any one suppose that the civil and naval authorities at Mobile would have permitted her to go out in broad day, in full view of the fleet, and to have thus rendered her capture certain? The attempt to have done so would have disclosed the purpose of the voyage, and have induced the seizure of the vessel and cargo, and death to every person concerned in the transaction.

The conduct, then, of the claimants throughout this transaction, we assume to have been open and fair.

II. *As to the law.*

1. The order of Admiral Farragut to his commander of the Mobile blockade, not to capture vessels and cargoes in the situation of the Sea Lion and cargo, together with his indorsement of the 'permit' of the acting collector, were acts incidental to his position, and privileged this vessel and cargo from capture.

In *The Hope*,[1] where the commander of one squadron gave a license with a view to exempt a ship and cargo from capture by another squadron, Lord Stowell expressly declared | that the admiral on a station has power p. 640
relative to the ships under his immediate command, and can restrain them from committing acts of hostility; though he said that the commander could not grant a safeguard of this kind beyond the limits of his own station.

Admiral Farragut did not go beyond the limits of his own station, but was acting within them. And he had given explicit orders to the commander of his squadron,—orders which must have been communicated at the time of the seizure in question to every vessel of the squadron, —that property in the predicament of that of the claimants should not be regarded as hostile, but be sent to New Orleans for an examination of the facts. Besides, by indorsing the permit of the acting collector he adopted and made it his own, and every officer of his command was bound to respect and enforce it.

2. Even if the act of Admiral Farragut, in privileging the property of the claimants from capture, was irregular, it by no means follows that such property is condemnable as prize. Where the owners stand

[1] 1 Dodson, 226.

clear of any intention of fraud their act is not illegal, although its authorization may have been irregular.

In the *Vrow Barbara*,[1] the vessel was taken on her voyage from Havre to Hamburg. She had been stopped and examined in going to Havre, and had been informed in effect that she might go there. The master knew of the blockade, but understood it had been relaxed. Lord Stowell restored the property, on the ground that she had been permitted to go in.

In *The Henricus*,[1] the master had been permitted by one of the blockading fleet to go in with a cargo of coal, and was captured in coming out. The court held that the permission to go in with a cargo included the permission to come out with a cargo: that is to say, a mere inferential permission to bring out a cargo was respected.

p. 641 In *The Venscab*,[1] the same principle was applied: 'I beg | it may be understood,' said Lord Stowell, 'that I hold the blockade to have existed generally, though individual ships are entitled to an exemption from penalty, in consequence of the irregular indulgence shown them by the blockading force.'

The Juffrow Maria Schrœder[2] stood on the same ground, and was decided on the same principle.

In *The Johanna Maria*,[3] Dr. Lushington, referring to the cases just cited as applicable to the blockade of the Baltic ports, said:

'If it can be shown that any vessel has been permitted improperly to enter or come out, I shall confer the benefit of restoration on a vessel so circumstanced.'

He held, too, in accordance with Lord Stowell, and in accordance with universal public law, that such restoration, in consequence of improper or irregular indulgence on the part of a blockading force, or in consequence of a more regular and formal license, did not have the effect to vitiate a blockade.

Further: The order of General Banks, approved and adopted by Admiral Farragut, was a legitimate exercise of their authority. In granting these special licenses, they had in view only public objects; they sought to obtain possession of an article which, by the policy of the hostile government, had become contraband of war, an article which this court, in Mrs. Alexander's case,[4] held liable to capture from its peculiar character and the position given it by hostile legislation. 'It is well known,' said the Chief Justice, in delivering the opinion of the court in that case, 'that cotton has constituted the chief reliance of the rebels for means to purchase the munitions of war in Europe. It

[1] Reported in the notes to The Juffrow Maria Schrœder, 3 Robinson, 155.
[2] 3 Robinson, 155.
[3] Deane on the Law of Blockade, 86, 115.
[4] 2 Wallace, 404.

is matter of history that, rather than to permit it to come into possession of the National troops, the rebel government has everywhere devoted it, however owned, to destruction. The | value of that destroyed at New p. 642
Orleans, just before its capture, has been estimated at $80,000,000. The rebels regard it as one of their main sinews of war, and no principle of equity or just policy required, when the National occupation was itself precarious, that it should be spared from capture, and allowed to remain in case of the withdrawal of the Union troops an element of strength to the rebellion.'

It was this peculiar property, this element of power and strength, this support of the Confederate treasury at home and abroad, that the military commanders sought to withdraw from the control of the enemy and subject to the control of the government. It was a means of coercing the hostile power; an operation of war under the guise of trade. It will not be denied that General Banks could organize military expeditions to capture this property, so important to the enemy and so important to us also. Could he not accomplish the same object by calling to his aid traders, who, under the stimulus of gain, would penetrate the hostile territory and bring out this support of the hostile existence? General Banks and Admiral Farragut were not thinking of commercial intercourse, but of crippling the enemy, and depriving him of his chief resource and main reliance. They were acting and prosecuting the war in one of the modes which, in the exercise of the large discretion incident to their position, they were entitled to select. They did not authorize general trade, general commercial intercourse irrespective of time or place or commodity (that to which neutrals might have objected); but what may be called a belligerent trade in its object and purposes, limited to a particular article, and that everywhere within the hostile territory liable to capture.

Mr. Ashton, Assistant Attorney-General, and Mr. Cushing, contra.

Mr. Justice SWAYNE delivered the opinion of the court.

The vessel and cargo were captured and condemned as | prize of war. p. 643
The appellants seek to reverse the decree upon the ground that both were protected by a license. The validity and effect of the alleged license is the main question to be considered. Before proceeding to examine that subject, there are several other features of the case which invite remark and must not be passed by in silence.

The vessel was fitted out and loaded at Mobile, which was then enemy territory, and in a state of stringent blockade. The cargo consisted of two hundred and seventy-two bales of cotton, and seven barrels of turpentine. She left Mobile on the 8th of May, 1863, under the Confederate flag. She had no other. About 12 o'clock in the night of the 9th of May, and about four miles southeast from Fort Morgan, she

was discovered, fired upon, stopped, seized, and sent to Key West, where the decree of condemnation was subsequently pronounced.

Netto was her captain, and Yocum the supercargo. There were on board, besides them, a crew of seven men and two passengers. Certain papers were found which passed into the hands of the captors, and to which it is proper to advert.

The ship's register set forth that it had been sworn by M. D. Eslava, that Yocum & Hohenstein, a firm in Mobile, under the name of J. Hohenstein & Co., were the sole owners of the vessel. The shipping articles engaged the crew to navigate the vessel from Mobile to Havana. The manifest sworn to by Netto, stated that the cargo was intended to be conveyed to that port. The Spanish consul certified that the goods named in the manifest, were on board and destined for Havana. The clearance, signed by the deputy collector, was for the same place. A letter from Oliver & Worne introduced Yocum to Brott, Davis & Shons, of New Orleans, and expressed the hope that lively business transactions between the two houses would follow. Another letter from the same firm to Pilcher, the President of the Bank of New Orleans, asked him to aid in Yocum's business, which it was said Yocum would explain to him. A memorandum, signed by Hohenstein & Co., stated
p. 644 that Yocum | had credit on their books for $150,000, and for $17,000, subject to a settlement between him and Hohenstein. The paper, relied upon as a license, was also found on board, and delivered over by Yocum to the captors. After the vessel was libelled, a claim was interposed by Netto and Yocum in behalf of Brott, Davis & Shons. It is under oath, and states that they believe the vessel and cargo are the property of that firm. Yocum states that he was put in charge of the cargo by one Worne, whom he believes to be a partner of Brott, Davis & Shons. They further say that the vessel was bound in good faith to New Orleans, there to deliver her cargo in pursuance of the license.

Brott and Davis gave their affidavit *in preparatorio*. They insist upon the license, and allege that it was their intention to cause the vessel and cargo to be taken to New Orleans. They aver that they are loyal citizens, and that no enemy of the United States had any interest in the vessel or cargo. The affidavit is very full as to the procuring and transmission of the alleged license, and as to the loading of the vessel at Mobile by their agents ; but is wholly silent as to who are the owners, and does not allege the whole or any part of the ownership to be in themselves. Under the circumstances, this omission can hardly be deemed accidental. It has very much the appearance of the caution of a special plea. Netto and Yocum were also examined *in preparatorio*.

They repeat their belief as to the ownership, except that Netto states the turpentine to have belonged to himself and the crew. Netto also

states, that after they had passed Fort Morgan, Yocum told him New Orleans was their destination, and that he would have obeyed Yocum's order to take the vessel there. Yocum testifies that he was only supercargo, that he was to receive $500 for his services, and that he had no interest in the property. He said further, that from what he had heard Worne say in Mobile, his understanding was, that the vessel and cargo belonged to Brott, Davis & Shons, and Oliver & Worne. His instructions were to proceed to the mouth of the Mississippi—thence to communicate with Brott, Davis & Shons, and to await orders from | them. Hubbel, p. 645
one of the passengers, in his examination *in preparatorio*, says that the clearance was taken for Havana as a blind to enable the vessel to get away. Yocum told him at Mobile that she was going to New Orleans. As evidence of Yocum's intention to take her to the blockading fleet, he says, that when she started the wind was so low that she could not make more than two miles an hour, and that hence it was difficult to prevail on the pilot to take her out.

In regard to the important fact last mentioned the captain and supercargo are wholly silent.

In the light of this testimony, it is difficult to resist the conclusion that the vessel left Mobile, with alternative purposes; one, if possible to evade the blockading fleet and make Havana; the other, if intercepted and seized, to set up the license and insist upon the pretext, that she was proceeding, under its authority, in good faith to New Orleans. As we shall not place our judgment upon this ground, it is unnecessary further to pursue the subject.

The license relied upon is as follows:

CUSTOM HOUSE, NEW ORLEANS,
COLLECTOR'S OFFICE, February 16th, 1863.

The United States military and other authorities at New Orleans permit cotton to be received here from beyond the United States military lines, and such cotton is exempt from seizure or confiscation. An order is in my hands from Major-General Banks approving and directing this policy. The only condition imposed is that cotton or other produce must not be bought with specie.

All cotton or other produce brought hither from the Confederate lines by Brott, Davis & Shons will not be interfered with in any manner, and they can ship it direct to any foreign or domestic port.

GEORGE S. DENISON,
Special Agent of the Treas. Dep't and Acting Collector of Customs.

Approved. D. G. FARRAGUT,
Rear Admiral.

The effect of this paper depends upon the authority under | which it p. 646
was issued. The fifth section of the act of July 13th, 1861, authorized the President to proclaim any State or part of a State in a condition of

insurrection, and it declared, that thereupon all commercial intercourse between that territory and the citizens of the rest of the United States, should cease and be unlawful, so long as the condition of hostility should continue, and that all goods and merchandise coming from such territory, into other parts of the United States, and all proceeding to such territory by land or water, and the vessel or vehicle conveying them, or conveying persons to or from such territory, should be forfeited to the United States: '*Provided, however,* That the President may, in his discretion, license and permit commercial intercourse with any such part of said State or section, the inhabitants of which are so declared in a state of insurrection, in such articles, and for such time, and by such persons, as he, in his discretion, may think most conducive to the public interest; and such intercourse, so far as by him licensed, shall be conducted and carried on only in pursuance of rules and regulations prescribed by the Secretary of the Treasury.'

There is no other statutory provision bearing upon the subject, material to be considered.

On the 16th day of August, 1861, the President issued his proclamation declaring the inhabitants of the rebel States, including Alabama, to be in a state of insurrection.

On the 28th of the same month the Secretary of the Treasury, pursuant to the provisions of the act referred to, issued a series of regulations upon the subject of commercial intercourse with those States.

These regulations continued in force until the 31st of March, 1863, when a new series were issued by the same authority. The former were in force when the alleged license bears date; the latter when the vessel and cargo left Mobile and when they were captured. It is unnecessary to analyze them. It is sufficient to remark, that they contain nothing which affords the slightest pretext for issuing such a paper. It is in
p. 647 conflict with rules and requirements contained | in both of them. It finds no warrant in the statute. The statute prescribes that the President shall license the trade. The only function of the Secretary was to establish the rules by which it should be regulated, when thus permitted. The order of General Banks is not produced. If it were as comprehensive as the special agent assumed it to be, it covered shipments to New Orleans from Wilmington, Charleston, and all other points in the rebel States. It embraced merchandise, coming alike from places within, and places beyond his military lines. With respect to the latter it was clearly void. The President only could grant such a license. Mobile was then in possession of the enemy. The vessel and cargo bore the stamp of the enemy property. The paper relied upon was a nullity, and gave them no protection. They were as much liable to capture and condemnation

as any other vessel or cargo, leaving a blockaded port and coming within reach of a blockading vessel.

The decree below was rightly rendered, and it is

AFFIRMED.

Mr. Justice GRIER:

I do not concur in this judgment. The vessel went out of Mobile by permission of the commander of the blockade there. To condemn such property would be a violation of good faith. No English court has ever condemned under such circumstances.

Mauran v. Insurance Company.

(6 Wallace, 1) 1867.

1. A taking of a vessel by the naval forces of a now extinct rebellious confederation, whose authority was unlawful and whose proceedings in overthrowing the former government were wholly illegal and void, and which confederation has never been recognized as one of the family of nations, is a 'capture' within the meaning of a warranty on a policy of insurance having a marginal warranty 'free from loss or expense by capture,'—if such rebellious confederation was at the time sufficiently in possession of the attributes of government to be regarded as in fact the ruling or supreme power of the country over which its pretended jurisdiction extended.
2. Accordingly, a seizure by a vessel of the late so-called Confederate States of America, for their benefit, was a capture within the terms of such a warranty.

ERROR to the Circuit Court for Massachusetts.

Mauran brought suit in that court against the Alliance Insurance Company on a policy of insurance upon the ship Marshall for one year from the 29th November, 1860, covering the sum of $8000. The insurance, as stipulated in the body of the policy, was 'against the adventures and perils of the seas, fire, enemies, *pirates, assailing thieves*, restraints, and detainments of all kings, princes, or people of what nation or quality soever.'

In the margin of the policy was the following:

'Warranted by the assured free from loss or expense arising from *capture*, seizure or detention, or the consequences of any | attempt p. 2
thereat, any stipulations in this policy to the contrary notwithstanding.'

The vessel was seized on the afternoon of the 17th of May, 1861, two or three miles inside of the bar at the mouth of the Mississippi River, on her way up to New Orleans, by the officers and crew of the steamer Music, belonging to the so-called Confederate States. Some persons on board the steamer at the time of the seizure, hoisted the Confederate flag to the mast-head of the Marshall, and informed the captain and pilot that the ship was 'a prize to the Confederate States.' Verdict and judgment having been given in favor of the insurance company, the question here on error was, whether this taking of the vessel by the naval

forces of the so-called Confederate States was a *capture* within the warranty of the assured in the margin of the policy? If it was, then the loss was not one of the perils insured against, and the judgment below was right.

Mr. Cushing (who submitted with his own, a learned brief of Messrs. R. H. Dana, Jr., and Horace Gray, Jr., in the case of another vessel before the Supreme Court of Maine), for the plaintiff in error:

If this loss was by 'assailing thieves' or 'pirates,' then the insurers are bound to pay; for undoubtedly a taking by assailing thieves or pirates does not operate to make in law a 'capture.' Rovers, thieves and pirates have always been treated as ordinary perils of the sea. Chancellor Kent[1] lays down the distinction in explicit terms:

'The enumerated perils of the sea, *pirates, rovers, thieves,* include the wrongful and violent acts of individuals, whether in the open character of felons, or in the character of a mob, or as a mutinous crew, or as plunderers of shipwrecked goods on shore. . . . But the stipulation of indemnity against *takings at sea, arrests, restraints, and detainments of all kings, princes, and people,* refers only to the acts of government for government purposes, whether right or wrong.' |

p. 3 Other writers make the same classification.[2] 'Taking by pirates,' says Mr. Dane,[3] 'has none of the effects of legal capture.'

Now, can *this court,* a court of *the United States,* treat the persons who made the seizure here otherwise than as pirates or thieves? The political department of the government, it will be conceded, has never acknowledged the rebel confederation as a government *de facto,* any more than one *de jure.* On the contrary, it is matter of common knowledge that it has most scrupulously, and in every form, avoided doing so. As to their captures of ships, it has actually treated them as 'pirates.'

The Crimes Act of 1790[4] makes the taking of a vessel of the United States by rebels an act of piracy. It says:

'If *any citizen* shall commit any *piracy* or *robbery* aforesaid, or any act of hostility *against* the United States, or *any citizen thereof,* upon the high seas, *under color of* any commission from any foreign prince or state, or *any pretence of authority* from *any person, such offender shall, notwithstanding the pretence of any such authority,* be deemed, adjudged, and taken to be a pirate, felon, and robber; and on being thereof convicted, shall suffer death.'

In *United States* v. *Wiltberger,*[5] the court, *obiter,* says that the *sole* object of this statute was to reach a citizen of the United States who depredates on commerce of the United States *under color of a foreign*

[1] 3 Commentaries, 302, note *d,* 6th ed.
[2] Nesbitt *v.* Lushington, 4 Term, 783; 2 Arnould on Insurance, §§ 303, 305, 306; 1 Phillips on Insurance, §§ 1106–1108; 2 Parsons' Maritime Law, 236, 246.
[3] 7 Abridgment, 92; and see 639 *et seq.*
[4] § 9, 1 Stat. at Large, 114.
[5] 5 Wheaton, 76.

commission. The word ' foreign ' here includes, of course, any government *other than the United States*, and especially a pretended government ; and most especially a pretended government in rebellion against our own.

The definition of piracy by the law of nations is this :

' Depredating on the seas, without being authorized by any | sovereign p. 4
state, or with commissions from different sovereigns at war with each other.' [1]

Of course, looking to all the conditions of the rebellion, cruising by rebels who are *as yet unacknowledged by anybody*, even as a *de facto* government, would be cruising *without being authorized by any sovereign*, and so would be piracy by the law of nations.[2]

The proclamation of the President of the United States of April 19, 1861,[3] is explicit, as follows :

' And I hereby proclaim and declare, that if any person, under the pretended authority of said (Confederate) States, or under any other pretence, shall molest a vessel of the United States, or the persons or cargo on board of her, such person will be amenable to the laws of the United States for the prevention and punishment of piracy.'

This proclamation is fully justified by the section of the Crimes Act heretofore cited. It was in force at the time of the taking of the ship Marshall. Its applicability is recognized by successive acts of Congress,[4] and it was obligatory on every citizen of the United States ; construing every contract made within the United States between citizens of the same.

How then can this court, a depository of the judicial power of the United States, recognize as a government of *any* kind, a confederation whose representatives the political department proclaims to be pirates, and who, as in the case of Smith, tried before GRIER, J.,[5] have been tried and convicted as such.

In whatever light they may be to be looked on by the courts of foreign powers, certainly all cruisers, under the flag of whatever combination of persons, are, in all courts *of the United States*, to be regarded as pirates by the law of nations, | unless such persons have been recognized p. 5
by the Executive as lawful belligerents, and so a *de facto* government. That this is a true principle of law, this court decided on all the questions arising out of the Spanish-American Revolution, holding that if the captors represented a *de facto* authority *recognized by the Executive* of the United States, they were not pirates by the law of nations,[6] but that if

[1] Lawrence's Wheaton's Int. Law, 246, ed. 1863.
[2] United States *v.* Klintock, 5 Wheaton, 144. [3] 12 Stat. at Large, 12, 58.
[4] Act of 24 July, 1861, Id. 273 ; Act of 6 Aug., 1862, Id. 314.
[5] 3 Wallace, Jr., MS.
[6] United States *v.* Palmer, 3 Wheaton, 610, 634 ; The Divina Pastora, 4 Id. 52 ; Nuestra Senora de le Caridad, Id. 497 ; The Josefa Segunda, 5 Id. 338 ; Nueva Ana, 6 Id. 193 ; Santissima Trinidad, 7 Id. 337.

not so recognized by the Executive, they were.[1] Indeed, on these public questions, courts must respect the acts of their own governments, whether herein those acts be reasonable or unreasonable, or even right or wrong. They cannot stultify their own countries.

So also is the law of Great Britain. In a debate on a matter quite kindred to this one, Lord Chelmsford said : [2]

' If the Southern Confederacy had not been recognized by us as a belligerent power, he agreed with his noble and learned friend (Lord Brougham), that any Englishman aiding them by fitting out a privateer against the Federal government would be guilty of piracy.'

The Lord Chancellor (Campbell) impliedly admitted this, in saying that an Englishman entering the Confederate service could not be deemed a pirate after the publishing of the Queen's proclamation recognizing the Southern States as ' entitled to the exercise of belligerent rights and carrying on what might be called a *justum bellum*.'

In accordance with these views is the case of *Swinerton* v. *Columbian Insurance Company*, in the Superior Court of New York City. There a policy of insurance was made on a schooner against the usual perils, including ' pirates, rovers, thieves,' but ' warranted free from loss or expense arising from capture, seizure, or detention, or the consequences
p. 6 of | any attempt thereat.' The vessel was lying at Norfolk, for repair, on the 21st of April, 1861, four days after the passage, by the State of Virginia, of her ' secession ordinance,' when a band of men came alongside of her with a steamboat, and professing to act by authority of the State of Virginia, without riot or tumult, towed her out into the channel, and there sunk her. The Superior Court, at first at *nisi prius*, and then *in banc*, held that the secession ordinance could not be admitted in evidence for the defence ; and that the loss did not come within the exception, but was a loss by pirates, rovers, and thieves. So also in point is the case, before the Commercial Court, or Handelsgericht, of Bremen,[3] of the Harvest, captured by the Shenandoah, a rebel cruiser ; where a similar decision was made, and supported by a learned opinion. It will be strange if foreign courts pay a respect to what is done by the political department of our government which the courts of our own country do not.

Messrs. B. R. Curtis and Storrow, contra :

The policy uses the word ' pirates ' in that simple and ordinary sense, in which it now is, and immemorially has been, known to the general commercial law of the civilized world ; and not to describe offenders against some municipal criminal law, of some particular country.

[1] United States *v.* Klintock, 5 Wheaton, 144 ; United States *v.* Smith, Id. 153.
[2] Hansard, vol. 162, p. 2082.
[3] Weser Weekly Zeitung, of January 12, 1867. A printed translation was furnished by Mr. Cushing to the court.

The interpretation and effect of policies belong to a system of law, existing before the statute of 1790, or any of President Lincoln's proclamations were made, and was not intended to be affected by them. This system of law is not merely a branch, or division of municipal law, but belongs to, and is part of, the common law of nations which defines piracy.[1]

Such instruments have no reference to the *legality* of governments: they refer always to *de facto* authority of kings, princes, and people; and an interpretation which | should make a risk depend on the legality p. 7
of an actual government, under whose authority the property had been captured, seized, or detained, would be unprecedented and dangerous.[2] Lemonnier[3] cites a decision of the Tribunal of Commerce, of Marseilles, that the revolted Colombians, having attacked only Spaniards, and not all nations like pirates, were to be considered a government.

No authority can be produced to show that a capture under a commission issued by a regularly organized *de facto* government, engaged in open and actual war, to cruise against its enemy, and against its enemy only, is piracy *under the laws of nations*.

The authorities are the other way.[4]

The Executive government of the United States has, by public proclamations and messages to Congress, and in other appropriate public documents, recognized and affirmed a condition of open and public war, existing between the United States and a *de facto* government of the so-called 'Confederate States.'[5] And the United States cannot at the same time insist that they have the belligerent rights which by the law of nations belong to a sovereign waging public war, and yet assert that there is no such public war as is known to the law of nations. That it is a *civil* war, does not change the rule of *the law of nations* respecting those who carry it on.[6]

Any capture or seizure, whether rightful or wrongful, and | whether p. 8
made under a commission from a *de jure*, or *de facto* government, or made by mere pirates, is equally within the warranty in this case. Such

[1] Warren *v.* The Man. Ins. Co., 13 Pickering, 518; Deshon *v.* The Mer. Ins. Co., 11 Metcalf, 199; The Malek Adhel, 2 Howard, 232; The Antelope, 10 Wheaton, 122.

[2] Nesbitt *v.* Lushington, 4 Term, 783.

[3] On Insurance, vol. 1, 251.

[4] The Savannah, Warburton's Report, 365–374; United States *v.* Smith, 5 Wheaton, 153, and note; Same *v.* Pirates, Id. 196; The Malek Adhel, 2 Howard, 211; The Sealskins, 2 Paine, 333; United States *v.* Hanway, 2 Wallace, Jr., 202; and see Mr. Burke's letter to Sheriffs of Bristol, vol. 2, p. 90, Little & Brown's edition of Burke's Works; Mr. Webster's Letter to Mr. Fox, 6 Webster's Works, 256, 257.

[5] The President's Proclamation of April 19, 1861; his Reply to the Virginia Commissioners (Moore's Rebellion Record, vol. i, p. 61); his Proclamation of April 27, 1861; his Message to Congress, July 4, 1861; his Proclamations of August 12, 1861, and of August 16, 1861.

[6] Vattel (Chitty's ed.), 424; Lawrence's Wheaton, 516, 522; Halleck's International Law, 233, 343; Santissima Trinidad, 7 Wheaton, 283; United States *v.* Palmer, 3 Id. 610; Neustra Senora, 4 Id. 497.

is the interpretation of the words ' capture, seizure, and detention,' by writers of authority on Insurance,[1] and by courts also. The English cases of *Powell* v. *Hyde*,[2] and of *Kleinwort* v. *Shepard*,[3] are in point. In the former case it was held by Lord Campbell, Coleridge, and Wightman, JJ., that the loss of a British vessel in the Danube by being fired upon by the Russians (then at war with Turkey, but not with England), was within the exception of ' warrant free from capture and seizure,' and in the second the terms were extended to a mutiny of Coolie passengers.[4]

And the words capture and seizure are so often used by correct writers and judges, and in legislation, to describe the acts of pirates and of persons acting under *de facto* governments, as to manifest a *jus et norma loquendi*.

Finally. The very question now raised has been fully argued and directly adjudicated in the Supreme Courts of Pennsylvania, Massachusetts, and Maine.[5]

We may concede that the United States have never admitted the so-called ' Confederate States ' to be a government. And this is a matter most proper to be asserted by the United States in its dealings with both its own citizens and foreigners. It may well treat every citizen of the United States who aided in the rebellion as committing treason or piracy ; and regard transfers of property, &c., made in virtue of the Confederate
p. 9 laws, and against those of the | United States, as void. So in dealing with foreign powers it may properly assert that these did a wrong to us in recognizing the Confederacy as a belligerent power. But this case raises no such question as any of these. The fact remains that here was a great power capable of levying war against us, which did so levy and wage war, and which made a capture. Much of the disquisition by opposing counsel is therefore *from* the purpose. It has no practical application.

Reply : The case of *Powell* v. *Hyde*, the first of the two English cases, relied on by the other side, was that of a ' capture ' or ' seizure,' in the usual sense of the words, made by a power authorized to wage war, and then actually waging war.

Kleinwort v. *Shepard*, the other English case—the only case in which ' seizure ' has been said to include acts of individuals not acting

[1] Marshall, pt. i, ch. xii, § 3 ; 1 Phillips, § 1110 ; 2 Arnould, *808, *811 ; Benecke, p. 348 (p. 230 of English ed.) ; Emerigon (by Meredith), 353 ; 3 Kent's Commentaries, *304 ; Pothier, Insurance, No. 54 ; Valin's Commentary, Art. 26, 46 ; 2 Boulay Paty Commercial Law, § 16, p. 102 (Brussels, 1838.)

[2] 5 Ellis & Blackburne, 607. [3] 1 Ellis & Ellis, 447.

[4] And see Goss *v.* Withers, 2 Burrow, 694 ; McCar *v.* New Orleans Insurance Co., 10 Robinson's Louisiana, 202, 334, 339 ; Tirrell *v.* Gage, 4 Allen, 245.

[5] Fifield *v.* Insurance Co., 47 Pennsylvania State, 166 ; Dole *v.* Same, 6 Allen, 373 ; Dole *v.* Same, 51 Maine, 464.

under the authority of a recognized government, and in which it was extended by the Court of Queen's Bench to the mutiny by Coolie passengers—was argued before Lord Campbell, Wightman, Crompton, and Hill, JJ., but four of the fifteen English common law judges, none of which four had any peculiar experience or authority in commercial law, and the weight of whose opinion must therefore depend upon the soundness of the reasons assigned for it. The case, before it is finally disposed of, may be taken to the Court of Exchequer Chamber, if not to the House of Lords, and their decision overruled. It is hardly in any respect such a decision as should induce this court to go against the recent express decision, in *Swinerton* v. *Columbian Insurance Co.*, of the Superior Court of the City of New York, a tribunal which has long held the position of a very high authority on questions of maritime law; or against the able decision in the Commercial Court of Bremen, a tribunal in which public law in reference to this class of cases is of necessity very familiar to the court.

Mr. Justice NELSON delivered the opinion of the court.

The question in the case is, whether this taking of the | vessel by the p. 10
naval forces of the so-called Confederate States was a capture within the warranty of the assured in the margin of the policy? If it was, then the loss is not one of the perils insured against, as the assured, in express terms, had assumed it upon himself.

A capture, as defined by some of the most eminent writers on insurance within the policy, is a taking by the enemy of vessel or cargo as prize, in time of open war, or, by way of reprisal, with intent to deprive the owner of it. This was probably the primary or original idea attached to the term in these instruments. Losses of ships and cargo engaged in commerce by the public enemy were the most to be apprehended and provided against. But usage, and the course of decisions by the courts, have very much widened this meaning, and it now may embrace the taking of a neutral ship and cargo by a belligerent *jure belli;* also, the taking forcibly by a friendly power, in time of peace, and even by the government itself to which the assured belongs.[1]

Capture is deemed lawful when made by a declared enemy, lawfully commissioned, and according to the laws of war, and unlawful when made otherwise; but, whether lawful or unlawful, the underwriter is liable; the words of the policy being broad enough, and intended to be broad enough, to include every species of capture to which ships or cargo, at sea, may be exposed. Any other rule would furnish but a very imperfect indemnity to the assured if we regard either the character of these seizures and the irregularities attending them, or the trouble,

[1] Phillips on Insurance, §§ 1108–1109; Arnould on Same, 808, 814; 2 Marshall on Same, 495, 496, 507; Powell *v.* Hyde, 5 Ellis & Blackburne, 607.

expense, and delay consequent upon the duty or burden of proving in a court of justice the unlawfulness of the act. It is never, therefore, a question between the insurer and the insured whether the capture be lawful or not. The recent case of *Powell* v. *Hyde*[1] is very decisive on
p. 11 this point. In that case a British ship passing | down the Danube was fired upon from a Russian fort and sunk. A war existed between Russia and Turkey, but none between the former and Great Britain. The policy of insurance in that case contained the warranty of the assured 'free from capture, seizure,' &c., upon which the underwriters relied, as here, for a defence. In answer to this it was urged for the assured that these words in the warranty related to a lawful capture or seizure, by a party having authority to make it, and that, inasmuch as the capture was in open violation of law and wholly illegal, it was not within the warranty, and the underwriters were, therefore, liable. But the court held otherwise, and determined that this term in the warranty was not confined to lawful capture, but included any capture, in consequence of which the ship was lost to the insured. This same principle was again deliberately asserted by the court in *Kleinwort* v. *Shepard*.[2] The same question had been decided many years before by Lord Mansfield in *Berens* v. *Rucker*,[3] in which he held the insurer liable in case of an illegal capture of a neutral vessel by an English privateer. Chancellor Kent states the rule as follows: 'Every species of capture, whether lawful or unlawful, and whether by friends or enemies, is also a loss within the policy.'[4] As kindred to this rule is another, that the insurer is liable for a loss by capture, whether the property in the thing insured be changed by the capture or not. In every case of an illegal capture the property is not changed, yet as between the insurer and the insured, the effect is the same as in case of a capture by an enemy in open war.

In the case of a capture under a commission from an organized government, against an enemy, *jure belli*, to bring the capture within the policy, it is not necessary that the commission should issue from a perfectly lawful government any more than that the capture itself should be lawful. The principle is the same. An illustration will be
p. 12 found in the | war between Spain and her revolted colonies in South America, which continued for many years. Our government was the first to recognize their independence, which was in 1822; but even down till this event, from the time the revolt had reached the dimensions of a civil war, the government had recognized the war, and conceded equal belligerent rights to the respective parties; and the capture of the vessels of Spain by a commander under a commission by one of the colonies in the exercise of this right, was recognized as legal as if it had occurred in

[1] Already referred to; 5 Ellis & Blackburne, 607.
[2] 1 Ellis & Ellis, 447.
[3] 1 Blackstone, 313.
[4] 3 Commentaries, 304–5.

open public war, and, as a matter of course, would have been within the marginal warranty clause of the insured in a policy of insurance. Indeed it has been so held. It will be observed that at this time these colonies had not achieved their independence ; they were yet in the heat of the conflict ; nor had they been recognized by any of the established governments on either continent as belonging to the family of nations. In this connection it will not be inappropriate to refer to the case of *United States* v. *Palmer*,[1] which was an indictment against the defendant for piracy in the capture of a Spanish vessel under a commission from one of these colonies, and which he set up as a defence. One of the questions certified from the circuit was, whether the seal annexed to the commission purporting to be a public seal used by persons exercising the powers of government in a foreign colony, which had revolted from its allegiance and declared itself independent, but had never been acknowledged as such by the United States, was admissible in a court of the United States as proof of its legal existence with or without proof of its genuineness. The court held that the seal of such unacknowledged government could not be permitted to prove itself, but that it might be proved by such testimony as the nature of the case would admit. The defendant was permitted, also, to prove that he was employed in the service of the colony at the time of making the capture, and which, it was agreed, would constitute a defence to the indictment | for piracy. p. 13
The proof became necessary on account of the obscurity and unknown condition of this incipient state.

Another illustration will be found in a capture by a *de facto* government, which government is defined to be one in possession of the supreme or sovereign power, but without right—a government by usurpation, founded perhaps in crime, and in the violation of every principle of international or municipal law, and of right and justice ; yet, while it is thus organized, and in the exercise and control of the sovereign authority, there can be no question between the insurer and the insured as to the lawfulness of the government under whose commission the capture has been made. If any presumption could properly be indulged as to the perils against which the insured would most desire to protect himself, it might well be captures by these violent and irregularly constructed nationalities. The court in the case of *Nesbitt* v. *Lushington*,[2] fitly described the character of the government contemplated in the clause respecting the restraints, &c., of kings, princes, or people, namely : 'the ruling power of the country,' 'the supreme power,' 'the power of the country, whatever it might be,'—not necessarily a lawful power or government, or one that had been adopted into the family of nations.

[1] 3 Wheaton, 610.

[2] 4 Term, 763.

Now, applying these principles to the case before us, it will be seen that the question is not whether this so-called Confederate government, under whose authority the capture was made, was a lawful government, but whether or not it was a government in fact, that is, one in the possession of the supreme power of the district of country over which its jurisdiction extended? We agree that all the proceedings of these eleven states, either severally or in conjunction, by means of which the existing governments were overthrown, and new governments erected in their stead, were wholly illegal and void, and that they remained after the attempted separation and change of government, in judg-
p. 14 ment of law, | as completely under all their constitutional obligations as before.

The Constitution of the United States, which is the fundamental law of each and all of them, not only afforded no countenance or authority for these proceedings, but they were, in every part of them, in express disregard and violation of it. Still, it cannot be denied but that by the use of these unlawful and unconstitutional means, a government, in fact, was erected greater in territory than many of the old governments in Europe, complete in the organization of all its parts, containing within its limits more than eleven millions of people, and of sufficient resources, in men and money, to carry on a civil war of unexampled dimensions; and during all which time the exercise of many belligerent rights were either conceded to it, or were acquiesced in by the supreme government, such as the treatment of captives, both on land and sea, as prisoners of war; the exchange of prisoners; their vessels captured recognized as prizes of war, and dealt with accordingly; their property seized on land referred to the judicial tribunals for adjudication; their ports blockaded, and the blockade maintained by a suitable force, and duly notified to neutral powers the same as in open and public war.

We do not inquire whether these were rights conceded to the enemy by the laws of war among civilized nations, or were dictated by humanity to mitigate the vindictive passions growing out of a civil conflict. We refer to the conduct of the war as a matter of fact for the purpose of showing that the so-called Confederate States were in the possession of many of the highest attributes of government, sufficiently so to be regarded as the ruling or supreme power of the country, and hence captures under its commission were among those excepted out of the policy by the warranty of the insured.

We could greatly extend the opinion upon this branch of the case by considerations in support of the above view, but the question has undergone very learned and able examinations in several of the State
p. 15 courts, deservedly of the highest | eminence, and which have arrived at

the same conclusion, and to which we refer as rendering further examination unnecessary.[1]

JUDGMENT AFFIRMED.

Dissenting, the CHIEF JUSTICE and Mr. Justice SWAYNE.

NOTE. At the same time with the preceding were argued and adjudged four other cases by the same plaintiff against other insurance companies, all four being adjudged in the same way as the one above reported. In two of them the policies and warranty were in the same language as in that case. In two others there was a difference in the marginal warranty of the insured in this, that while he warranted free from loss or expense by capture, &c., 'ordinary piracy' was excepted, so that if the loss was on account of a capture or seizure by pirates, the insured would have been entitled to recover. But NELSON, J., giving the judgment of the court, observed that as the court had arrived at the conclusion that the capture of the vessel was under the authority of a *quasi* government, or government in fact (the ruling power of the country at that time), it was to be held to be within the warranty or exception in the marginal clause. Dissenting, the CHIEF JUSTICE and SWAYNE, J.

The Watchful.

(6 Wallace, 91) 1867.

1. A libel case, charging the vessel and cargo to be prize of war, dismissed because no case of prize was made out by the testimony.
2. But because the record disclosed strong *prima facie* evidence of a violation of the laws of navigation, and probably of our revenue laws also, the case was remanded, with leave to file a new libel according to these facts.

APPEAL from the District Court for the Eastern District of Louisiana.

In that court the schooner Watchful and cargo had been libelled as prize of war, and a decree rendered dismissing the libel, and restoring the property to the claimant. |

The claimant, one Wallis, to whom the property plainly belonged, p. 92
was a citizen of Pennsylvania, residing at Philadelphia, and the evidence showed no reason to doubt his loyalty to the Federal government during the recent war. Nor was there any proof of intention to break the blockade or to trade with the enemy. It appeared only that the claimant had sold, in the late civil war in Mexico, to that party which was led by President Juarez, two hundred and fifty-two cases of firearms, which he had agreed to deliver on the Mexican coast, near Matamoras, and when his vessel arrived near that place, it was found that the French army occupied the post, and no delivery could be made to the Juarez party. Under these circumstances, the officer in command started for New Orleans, not then blockaded, but in possession of the Union forces. On the way to that port his vessel was captured and sent in as prize.

The record did, however, seem to disclose some facts, in other respects, of a sinister character. It seemed to show that the vessel had cleared

[1] Dole *v.* New England Mutual Ins. Co., 6 Allen, 373; Fifield *v.* Ins. Co., 47 Pennsylvania State, 166; Dole *v.* Merchants' Marine Ins. Co., 51 Maine, 464.

for Hamburg, when her real destination was Matamoras; that after she was out at sea, her clearance had been altered by erasing the word 'Hamburg' and substituting in its place the word 'Matamoras;' that a false manifest had been used, and that the fact of the main cargo of two hundred and fifty-two cases of arms being on board, had been purposely concealed from the custom-house officers at New York, whence the vessel sailed.

Upon these latter facts, the Attorney-General now insisted that even admitting that there might be no sufficient proof of intent to break the blockade or to trade with the enemy, and so that the case was not one of prize, yet that the record before the court disclosed such a gross violation of our navigation laws, and possibly of our revenue and neutrality laws, that the case should be remanded to the District Court, with leave to file a new libel, or for such other proceedings as the government may deem advisable in the matter.

The claimant was not represented in this court by counsel.

p. 93 Mr. Justice MILLER delivered the opinion of the court.

It is very clear that there is no case of prize made out by the evidence. The property, which was undoubtedly Wallis's, was therefore not enemy property; nor is there any evidence of intention to break the blockade or to trade with the enemy. The case is so destitute of all the elements of prize that the present libel was properly dismissed.

As to the other point more insisted on by the Attorney-General. The record, as it stands, shows that the vessel cleared for Hamburg, when her destination was certainly Matamoras. That her clearance was probably altered after she was at sea, by writing over the word 'Hamburg' the word 'Matamoras.' That a false manifest was used, and the fact of the main cargo of two hundred and fifty-two cases of arms being on board, was carefully concealed from the officers of the customs at New York, from which port she sailed. It is not necessary to go any further into this evidence, or to express any other opinion on it, than to say that it presents a *prima facie* case of violation of municipal law, which justifies further investigation.

In the case of *United States* v. *Weed et al.*,[1] we had occasion, at the last term, to consider the question of the practice proper under such circumstances. We then came to the conclusion that where sufficient evidence was found to justify it, the case would be remanded to the court below for an amendment of the libel, or for such other proceedings as the government might, under all the circumstances, choose to adopt.

The judgment of the District Court, dismissing the libel in prize, is accordingly affirmed, but that part of the decree awarding restitution

[1] 5 Wallace, 62.

of the vessel and cargo, is reversed, with directions to allow libellant a reasonable time to file a new libel. If this is not done within the time thus fixed by the court, the property to be restored by a new decree.

The Sea Witch.

(6 Wallace, 242) 1867.

Restitution of a neutral vessel ordered, which had apparently set out on a lawful voyage, though she was captured out of the most direct and regular course of it, and in a position open to some question; there having been heavy weather which might have made her desirous to take the course she did,—one hugging a semicircular coast rather than a more direct one across its chord.

APPEAL from the District Court of the United States for the Eastern District of Louisiana.

The schooner Sea Witch was captured in the Gulf of | Mexico on the p. 243
31st of December, 1864, by the United States war steamer Metacomet, for alleged breach of the blockade of the Texas coast, then established by our government.

The schooner was a neutral vessel, with a neutral cargo, coffee, drugs, &c., regularly cleared from Vera Cruz for New Orleans, under a license granted by the vice-consul of the United States, in pursuance of the proclamation of the President, opening the port of New Orleans to trade, and of the regulations of the Secretary of the Treasury. But at the time of the capture she was out of the ordinary and most direct line of a voyage from Vera Cruz to New Orleans, and somewhat along the coast and in a position to go to Galveston, Texas, then blockaded. She had encountered heavy weather before the capture and was somewhat damaged; and it was alleged by the master that he had abandoned the voyage to New Orleans, and was about returning to Vera Cruz. Having been brought into New Orleans and libelled as prize in the District Court, restitution was decreed and a certificate of reasonable cause given the captors. The United States appealed.

Mr. Ashton, special counsel of the United States, contended that the case exhibited but the ordinary sinuous devices of blockade-runners; simulating one voyage, purposing another. The vessel was just where she would have been had she been going to Galveston, and where she would not have been if going to New Orleans.

Moreover at this time, as is matter of public history, New Orleans had been but recently opened to trade, and of course was glutted with the articles which this vessel carried. Coffee was higher in Vera Cruz than in New Orleans; and as for drugs, it was shipping 'coals to New Castle,' to take them to the last-named port. Galveston, on the other hand, closely blockaded, was in extreme necessity of both.

Mr. Marvin, contra.

The CHIEF JUSTICE delivered the opinion of the court.

p. 244 The only ground of suspicion that a violation of the blockade | was intended is the fact that the vessel, when captured, was out of the most direct regular course to New Orleans, and in a part of the gulf where she would very probably have been had her real destination been Galveston. But we think this is sufficiently accounted for by the weather, and by the probability that such a vessel, really bound for New Orleans, would prefer to keep at no greater distance from the shore than the blockade would require, rather than take the more direct course across the gulf.

It was stated in the argument that the cargo of the vessel would not command at New Orleans so good a price as at Vera Cruz; and this circumstance, if proved, would be entitled to great weight. But there is no evidence of that sort in the record.

On the whole, therefore, we think that the decree of the District Court was correct, and shall order that it be

AFFIRMED.

The Flying Scud.

(6 Wallace, 263) 1867.

1. A cargo shipped from a neutral country by neutrals resident there, and destined ostensibly to a neutral port, restored with costs after capture in a suspicious region, and where the vessel on its outward voyage had violated a blockade; there having been nothing to fix on the neutrals themselves any connection with the ownership or outward voyage of the vessel (which was itself condemned), nor anything to prove that *their* purposes were not lawful.
2. A part of the cargo which had been shipped like the rest, except that the shipper was a merchant residing and doing business in the enemies' country, distinguished from such residue and condemned.

APPEAL from a decree of the District Court of the United States for the Eastern District of Louisiana.

The Scud and her cargo were captured during the late rebellion, by the United States Steamer Princess Royal, at the mouth of the Rio Grande, on the 12th August, 1863, and brought into New Orleans for condemnation.

The Rio Grande, as is known, separates Texas, then in rebellion against the United States, from Mexico, then a neutral country; the position of the stream between the neutral and rebel regions having allowed, of course, great opportunities to illicit trade with Texas, under the guise of lawful trade with Mexico.[1]

The proofs in the case showed that the vessel was a British vessel, and had left Nassau in January, 1863, laden with a cargo of timber, tin, iron, powder, and horseshoes, and was destined ostensibly for

[1] See The Peterhoff, 5 Wallace, 28, where the matter is set forth.

Matamoras, Mexico (a place separated from Texas and the commercial town of Brownsville in it only by the dividing river). She arrived at Matamoras, that is to say, at the mouth of the Rio Grande (where, on account of a bar, vessels of any size are obliged to anchor), on the 1st of March; after remaining there a week or ten days, she sailed for Brazos Santiago, a port of Texas about nine miles from the mouth of the Rio Grande, where her cargo was discharged, and carried to Point Isabel, also in Texas. | The vessel remained at Santiago till some time in May, p. 264
when she returned to the mouth of the Rio Grande. While here at anchor she was, on the 15th July, 1863, chartered by one B. Caymari, a subject of Spain, doing business at Matamoras, as a merchant there, to carry a cargo of cotton from Matamoras to Havana. She continued at anchor at the mouth of the Rio Grande till the cargo of cotton was put on board in July and August, with which she was laden when captured. All the cotton was purchased at Matamoras, that is to say, in Mexico, and was brought from storehouses from Bagdad, the port of entry of Matamoras, or Boca del Rio, in Mexico, not far off, down the river, in lighters, to the Scud, which was anchored outside of the bar, and there loaded. There were some fifty or sixty merchant vessels at the mouth of the river at the time of the capture, and had been from the time of the Scud's first arrival there.

Hart, the owner of the vessel, and who was a British subject, put in a claim for the vessel.

Caymari, already mentioned, put in a claim, as owner of one hundred and thirty-seven bales of the cotton; Jules Aldige, a subject of France, but, like Caymari, doing business as a merchant at Matamoras, a claim for thirty-eight bales; and Lopez and Santos Coy, citizens of Matamoras, in Mexico, but who, some years before the capture, had removed to Brownsville, in Texas, a claim for thirty bales.

The court below condemned the vessel and cargo as prize of war. There was no appeal by the owner of the vessel, so that the only question here was in regard to the cotton.

Messrs. Dunning and Donohue, for the appellants, claimants of the cotton:

All trade between neutral ports in time of war is valid except (1) to blockaded ports, and (2) with contraband. The mouth of the Rio Grande was not and could not be blockaded so as to prevent trade with Matamoras, which is in a neutral country.

All the cotton was purchased at Matamoras, in this neutral country. The only circumstance militating against our | claim is that the vessel p. 265
did once land a cargo in Texas. But the case does not show that any one of the claimants had anything to do with that voyage or even ever heard of it. Neutrals themselves, they found a neutral vessel outside the bar ready to carry their cotton to a neutral port, and they chartered

her. The vessel was lying at anchor for weeks, of course in sight of the blockading fleet; and the captors seize her only after she is loaded. The claimants of the cotton had a right to suppose that she would be unmolested. They were misled by this lying by of the captors; and even if guilty, their cargo ought to be restored.[1]

Mr. Ashton, special counsel of the United States, contra:

A person carrying on trade in time of war in a region so exceedingly suspicious as from its geographical character was the mouth and lower part of the *Rio Grande,* must show a case above all suspicion. The outward voyage, which undoubtedly was meant for Texas, and was criminal, involves the present one in grave suspicion.

As to the claim of Lopez and Santos, having been merchants in a hostile country, the fact that they shipped the cotton from a neutral one, can't save it. It was enemies' property, and as such confiscable.[2]

Mr. Justice NELSON delivered the opinion of the court.

The proofs are full and uncontradicted, that each of the claimants purchased the cotton in question from different houses in Matamoras, and were merchants doing business there, with the exception of Lopez and Santos, who had removed to Brownsville, Texas, some year before the capture, from Matamoras, and were established in business there. It further appears from the proofs that the cotton was in the warehouses at Boca del Rio, or Bagdad, which is the port of entry for Matamoras, was carried in lighters from thence to the schooner, and taken on board. These proofs, and the greater portion of those which make the case, were
p. 266 produced | on an order for further proofs. The transaction appears free from all doubt or obscurity. The claimants, for aught that is shown, had no connection whatever with the cargo shipped from Nassau, and discharged at Brazos, or with the voyage, or with the vessel, until it was chartered by Caymari to carry a cargo of cotton from Matamoras to Havana, which is dated the 15th day of July, 1863. The argument, therefore, founded on the suspicion that the claimants were connected with the breach of blockade at Brazos, in the cruise of the inward voyage, is without any foundation.

The decree below must be reversed, except as to the thirty bales claimed by Lopez and Santos. Although they are Mexican citizens, yet being established in business in the enemies' country, must be regarded according to settled principles of prize law, as enemies, and their cotton as enemies' property.

The decree below affirmed as to the thirty bales, and reversed as to the thirty-eight (38) and the one hundred and thirty-seven (137), and case remitted, with directions to enter decree for claimants, Jules Aldige and B. Caymari, restoring their cotton with costs.

DECREE ACCORDINGLY.

[1] The Neptunus, 2 Robinson, 110. [2] Mrs. Alexander's Cotton, 2 Wallace, 404.

The Adela.

(6 Wallace, 266) 1867.

1. Neither an enemy nor a neutral acting the part of an enemy can demand restitution on the sole ground of capture in neutral waters. *The Sir W. Peel* (5 Wallace, 535), affirmed.
2. A vessel condemned for intended breach of the blockade established by the United States of her southern coast during the late rebellion; the vessel having been found near Great Abaco Island, with no destination sufficiently proved, without sufficient documents, with a cargo of which much the largest part consisted of contraband of war, and with many letters addressed to one of the blockaded ports, for which the chief officer stated distinctly that she meant to run.

APPEAL from a decree of the District Court for the Southern District of Florida, condemning the Adela and her cargo | as prize to the Quaker p. 267
City, a war steamer of the United States during the blockade established by the Federal government of its southern coast during the late rebellion. The ship and cargo were apparently neutral property. The condemnation was for attempted breach of blockade.

Mr. Ashton, special counsel for the United States; Mr. A. F. Smith, contra.

The CHIEF JUSTICE delivered the opinion of the court.

It is claimed that the capture took place in British waters. It was made, in fact, near Great Abaco Island, which belongs to Great Britain; but the evidence is by no means convincing that it was made within three miles from the land. On the contrary, while it is not, perhaps, certain that the Adela was without the line of neutral jurisdiction when first required to lay to by the Quaker City, it cannot be doubted that she had passed beyond it when she was actually captured. If, however, the capture had been actually made in neutral waters, that circumstance would not, of itself, prevent condemnation, especially in a case of capture made in good faith, without intent to violate neutral jurisdiction, or knowledge that any neutral jurisdiction was in fact infringed, and in the absence of all intervention or claim on the part of the neutral government.[1] 'It might,' as was observed in the case of *The Sir William Peel*,[2] 'constitute a ground of claim by the neutral power whose territory had suffered trespass, for apology or indemnity. But neither an enemy, nor a neutral acting the part of an enemy, can demand restitution on the sole ground of capture in neutral waters.'

We come, then, to the grounds of condemnation in the District Court.

The evidence of neutral destination in the preparatory proof was contradictory. The master and several other witnesses declared that

[1] The Etrusco, 3 Robinson, 31; Vrow Anna Catharina, 5 Id. 144.
[2] 5 Wallace, 535.

her destination was Nassau, and that they knew of no ulterior destina-
p. 268 tion. The credibility of | their statements was much impaired by their evasive character. The master, particularly, professed himself entirely ignorant of the nature or ownership of the cargo; declared that he had no bill of lading, or any other document relating to the merchandise on board, and knew nothing of the ownership of the vessel except what he derived from the ship's register. He was appointed master by one Burns, of Liverpool, who shipped the goods, whether for himself or as agent for other parties, and on whose real account, risk, and profit, he did not know.

On the other hand, the chief officer stated distinctly that the Adela was intended to run the blockade, and would have entered Nassau as her first port, and, as he believed, Charleston as her next.

The character of her cargo, of which much the largest part consisted of Enfield rifles and other goods clearly contraband of war, and the destination of the letters found on board, many of which were directed to Charleston, Savannah, and neighboring places, strongly confirm the testimony of the chief officer.

Upon the whole evidence we are satisfied that the Adela and her cargo were, in fact, destined for a blockaded port, and that the decree of the District Court was correct. It is therefore

AFFIRMED.

The Battle.

(6 Wallace, 498) 1867.

Capture as prize of war, *jure belli*, overrides all previous liens.

APPEAL from the District Court of the United States for the Southern District of Florida.

The libel set forth a seizure of the steamer Battle and cargo on the 18th July, 1863, on the high seas, as prize of war, which were brought into the port and harbor of Key West. She was captured about fifty miles south-southeast from Mobile Point by the United States steamer De Soto, Walker commanding. No claim of ownership for vessel or cargo was presented to the court. The vessel had just run, or was in the act of running, the blockade of Mobile when she was captured. The vessel and cargo were sold pending the suit. The proceeds of the sale of the vessel were $23,000, and of the cargo, $240,895.62. The vessel and cargo were condemned for breach of blockade, and also as enemy property.

There were two claims set up against the steamer in the court below, one by James Brooks, of New Albany, State of Indiana, for supplies furnished at that port in May, 1860, to the amount of $3408.32, and another by Daniel Hipple and others for materials furnished, and for work and labor in building a cabin on said boat, in January, 1860, to

the amount of $7230.92, at the port of New Albany aforesaid; that after deducting all payments a balance remains due of $3615.45. These claims were dismissed by the court below.

The appellant was not represented by counsel; Mr. N. Wilson, for the captors, and Mr. Ashton, special counsel, for the United States.

Mr. Justice NELSON delivered the opinion of the court.

The principle is too well settled that capture as prize of war, *jure belli*, overrides all previous liens, to require examination.[1]

DECREE AFFIRMED.

The Wren.

(6 Wallace, 582) 1867.

1. The liability to confiscation, which attaches to a vessel that has contracted guilt by breach of blockade, does not attach to her longer than till the *end* of her return voyage.
2. A vessel condemned below as enemy's property restored by this court; the proofs being of a hearsay and loose character and such as did not rise to the dignity of evidence within the law of that subject. But costs were withheld.

APPEAL from the District Court for the Southern District of Florida, condemning as prize of war the Wren.

The steamship Wren, a merchant vessel, left the port of Havana on the 12th of June, 1865, for Liverpool, *via* Halifax, Nova Scotia, with a crew of about thirty-five persons, who, on the morning of the next day, mutinied, confined the officers in their quarters, carried the vessel into the port of Key West, and delivered her as prize to the acting admiral commanding at that station. The seizure was in pursuance of secret arrangements with the United States consul at Havana, before the vessel left that port. A libel was filed against the vessel by the United States District Attorney, before the judge of the Southern District of Florida, as prize of war. The master, one Stiles, put in a claim in behalf of *John Laird*, a British subject, as owner.

This Stiles had been an officer in the navy of the United States. The record also disclosed this answer of his to the standing interrogatory as to the papers of the vessel:

All the letters and papers of which he has any knowledge of having been on board on the present voyage were taken by the asserted captors with the exception of one letter to himself from the agent of the vessel, Mr. Helms, at Havana, which was *destroyed*, and an order in favor of this deponent from Mr. Helms | for the payment of £40, payable on p. 583
delivery of the ship at Liverpool.

After hearing the proofs, including those hereafter mentioned, the court condemned the vessel on the ground that she was the *property of the enemies of the United States*. Laird appealed.

[1] The Hampton, 5 Wallace, 372; The Frances, 8 Cranch, 418.

In this court it was insisted, that the vessel was liable to be condemned—

1. For breach of blockade on the voyage next preceding that on which she was captured.

2. As being enemies' property.

1. *As respected the breach of blockade.* It appeared that the vessel had been engaged in running the blockade of the port of Galveston, Texas, from the port of Havana, and that a short time before she entered on the present voyage she had successfully entered Galveston, discharged her cargo, and taken on one of cotton, and returned in safety to Havana.

2. *As it respected the ownership.* On the side of the claimant, it appeared from the *registry* of the vessel that the 'Wren,' her registered name, was a British ship, built at Birkenhead, in Chester County, England, by Messrs. Laird Brothers, in 1864; that she belonged to John Laird, the younger, of Birkenhead, ship-builder, as owner; that William Raisbeck was, at the date of the registry, master of the ship; that Liverpool was her port of registry; and that she was of 267 tons registry tonnage. The registry bore date the 24th December, 1864.

John Duggan, one of the crew examined *in preparatorio*, and who resided in Liverpool, testified that he shipped in the vessel at Liverpool, in December, 1864, on the voyage to Havana, and continued one of her crew while she was engaged in running the blockade, and down till her seizure by the crew, the 13th June, 1865. He stated that she was British built, called The Wren, and never had any other name; and that he knew nothing as it respected any bill of sale. Other witnesses examined on this subject of a sale agreed with this witness. Shipments addressed to him as master, dated Havana, 15th March, 1865, showed that Raisbeck,
p. 584 the registered master of the vessel, came out with her to Havana. Stiles was appointed master afterwards.

On the other hand, the material evidence, to prove that the vessel at the time of seizure was enemies' property, was as follows: The answers of the purser of the ship, McGahan, to the fourteenth interrogatory were thus:

'He *believes* that Frazer, Trenholm & Co., of Liverpool, are the owners of the vessel, and were so at the time she was seized; has no personal knowledge as to who are the owners; he has *heard* Major *Helms*, at Havana, and Mr. Lafitte also, at Havana, *speak of Frazer, Trenholm & Co., as owners.*'

So Duggan, one of the crew, in reply to the fifth interrogatory:

'He does not know to whom the vessel belonged, but *has heard* Captain Moore, one of her former masters, with whom he sailed in said vessel in former voyages, *say* that she was owned by the Confederate government.'

Another item of proof relied on was, that Major Helms, a Confederate agent at Havana (and who had been connected in some way with the voyages of the vessel while running the blockade), appointed Stiles to the command of the vessel for the voyage from Havana to Liverpool. McGahan, the purser already mentioned, testified that the master was appointed to command, *as he understood*, by Major Helms, at Havana; he did not *know* who delivered possession of the vessel; he *believed* that the master took possession by the authority of Major Helms. Duggan, one of the crew, stated that the name of the master was Stiles; that he was appointed to the command of the vessel by Major Helms, at Havana.

McGahan was again examined, among others, on an order for further proofs, in which examination he says that he did not know who appointed Stiles to the command of the Wren at the time of leaving Havana; he *believed that Major Helms* appointed him; he arrived at the conclusion from hearing Major Helms speak of the resignation of the former captain.

It appeared, however, from the testimony of Stiles himself, | and of p. 585
Long, his first officer, that he was appointed to the command by a Mr. Ramsey, who shipped the crew at Havana for the voyage to Liverpool, and thus seemed to have had some agency of the vessel.

The first officer stated, also, that when he needed anything for the use of the vessel, he was generally sent by Captain Stiles to Ramsey to obtain it.

Mr. Pierrepont, for the appellant, contended—

On the 1st point: That the vessel having run the blockade and *completed* her return voyage, ceased to be *in delicto*.[1]

On the 2d point: That there was no sufficient evidence whatever—it being, at best, but slight and loose hearsay—of enemy property, even if war had not ceased before the capture, and made prize of war impossible. But the war had ceased. This capture was on June 16th. It was matter of public history, and one of which the court would take judicial notice, that Lee had surrendered 9th April, Kirby Smith and Johnson in the same month, and that Davis was captured on the 13th May. Independently of this, that the capture was by a band of mutineers while the vessel was on a peaceful voyage, which took from the case every aspect of capture *jure belli*.

Mr. Ashton, special counsel of the United States, contra, argued—

1. That the *last* voyage before the capture having been one in breach of blockade, this subjected the vessel to lawful capture on the present voyage.[2]

[1] Wheaton on Captures, 306; Haslett *v.* Roche, Maritime Warfare, 175; 1 Duer on Insurance, 88; 1 Kent's Commentaries, 152; The Mentor, 1 Robinson, 179; The Rosalie and Betty, 2 Id. 343; The Nancy, 3 Id. 122; The Lisette, 6 Id. 387; Carrington *v.* The Merchants' Insurance Co., 8 Peters, 495; Williams *v.* Smith, 2 Caines, 1.

[2] The Christiansberg, 6 Robinson, 376.

2. That the register was a mere cloak for rebel title, that the Lairds were not *novi hospites* in this court. They were notorious as builders of
p. 586 the Alabama and other piratical | cruisers of the rebel combination. Mr. Trenholm, of the firm of Frazer, Trenholm & Co., was a citizen of the rebel confederacy. The character of all these parties, and of rebel ship-building interests, was established by the judicial records of Great Britain and the diplomatic history of the late contest,[1] and were facts of which this court would take cognizance, and to which it would give due effect in a case of asserted ownership by these firms or any of their members, of a vessel found in any way employed or navigated in the interest of their rebel patrons. Moreover, Helm was an agent of the confederacy. Stiles had been an officer of its marine forces. And the spoliation of papers was the crowning proof. The capture was made *nondum cessante bello*, and though effected by non-commissioned persons, yet being adopted by the government, the property became on condemnation one of its droits, as it became, independently of capture, as part of the assets of the extinct confederation.

Mr. Justice NELSON delivered the opinion of the court.

The court below condemned the vessel on the ground that she was the property of the enemies of the United States. And this is the only question in the case. For, although it was insisted on the argument that the condemnation might have been placed on the ground that the vessel was taken in contemplation of law *in delicto*, for violating the blockade of the port of Galveston, Texas, the position is founded in a clear misapprehension of the law. The doctrine on this subject is accurately stated by Chancellor Kent.[2] 'If a ship,' he observes, 'has contracted guilt by a breach of blockade, the offence is not discharged until the end of the voyage. The penalty never travels on with the vessel further than to the end of the return voyage; and, if she is taken in any part of that voyage, she is taken *in delicto*. This is deemed reasonable, because no other opportunity is afforded to the belligerent force to vindicate the
p. 587 law.' And | the modern doctrine is now well settled, that the only penalty annexed to the breach of a blockade is the forfeiture of vessel and cargo when taken *in delicto*. The earlier doctrine was much more severe, and inflicted imprisonment and other personal punishment on the master and crew.

2. As respects the ownership. The certificate of registry, under the English acts, must specify the name, occupation, and residence of the owner, the name of the ship, the place to which she belongs, her tonnage, the name of the master, the time and place of the built, name of the surveying officer, together with a particular description of the vessel.

[1] Diplomatic Correspondence, part 1, pp. 222, 377, 381, 382.
[2] 1 Commentaries, 151.

This act has been fully complied with in the present case. And the certificate shows that the claimant is the builder of the vessel and owner, and the proofs show with reasonable certainty that his registered master brought the vessel to Havana, and was there engaged in command of her within three months after she was launched and fully equipped for the voyage, and which was within three months of the time when she was seized, as prize, by her crew. It is quite apparent, therefore, upon the proofs, that the claimant not only built the vessel, but put his master in command in this, her first voyage, and the presumption would seem very strong, if not irresistible (nothing else in the case), that he continued the owner for the short period of six months, which elapsed after she was built, and before the seizure took place. In addition to this, she was in the command of a master claiming to represent Laird as owner. These acts, in connection with the registry, afford strong evidence that the title of the vessel was in the claimant.[1]

Now, most of the proofs relied on to disprove this evidence are wholly inadmissible, and incompetent as testimony in a court of justice. We cannot think that it needs any argument to show that they do not rise to the character or dignity of testimony in any court that respects the law of evidence.

We agree that in the facts and circumstances surrounding | and p. 588
attending the history and operations of this vessel, and of the individuals connected with her, there are matters for well-grounded suspicion and conjecture as it respects the purpose and intent with which the vessel was originally built and sent to Havana; and, as she entered immediately in furnishing supplies to the enemy and receiving cargoes of cotton in return, it is not unnatural or unreasonable to suspect that the so-called Confederate States, or their agents, had some connection, if not interest in her. But this alone is not evidence upon which to found a judgment in the administration of justice. The facts that the master, Stiles, who was put in command of her for the voyage home, from Havana to Liverpool, was an officer in the enemies' naval service, and had belonged to the United States navy; and Helms, who was in some way, not explained, connected with her voyages in running the blockade, and who was the agent of the enemy at Havana, might well be entitled to consideration and weight on the question if there had been any legal proof in the case laying a foundation for such a conclusion. So, also, would the evidence that Stiles destroyed at the time of the capture a letter from Helms, agent of the ship, as he calls him, to himself, and an order for the payment to him for £40 on the delivery of the ship at Liverpool. But in the view we have taken of the case there is no foundation of legal proof of the ownership of the vessel in the Confederate

[1] Cowen's Phillips, vol. 3, p. 39; 3 Kent's Commentaries, 150.

States on which these circumstances can rest, or be attached, as auxiliary considerations to influence the judgment of a court.

Our conclusion is, that the decree below must be REVERSED, and the vessel

RESTORED, BUT WITHOUT COSTS.

The Georgia.

(7 Wallace, 32) 1868.

1. A case in prize heard on further proofs, though the transcript disclosed no order for such proofs; it having been plain, from both parties having joined in taking them, that either there was such an order, or that the proofs were taken by consent.
2. A *bonâ fide* purchase for a commercial purpose by a neutral, in his own home port, of a ship of war of a belligerent that had fled to such port in order to escape from enemy vessels in pursuit, but which was *bonâ fide* dismantled prior to the sale and afterwards fitted up for the merchant service, does not pass a title above the right of capture by the other belligerent.

APPEAL from the District Court of Massachusetts, condemning as prize the steamship Georgia, captured during the late rebellion. The case, as derived from the evidence of all kinds taken in the proceedings, was thus:

The vessel had been built, as it appeared, in the years 1862–3, at Greenock, on the Clyde, as a war vessel, for the Confederate government, and called the Japan; or if not thus built, certainly passed into the hands of that government early in the spring of 1863. On the 2d of April of that year, under the guise of a trial trip, she steamed to an obscure French port near Cherbourg, where she was joined by a small steamer with armaments and a crew from Liverpool. This armament and crew were immediately transferred to the Japan, upon which the Confederate flag was hoisted, under the orders of Captain Maury, who had on board a full complement of officers. Her name was then changed to the Georgia, and she set out from port on a cruise against the commerce of the United States After being thus employed for more than a year—having in the meantime captured and burnt many vessels belonging to citizens of the United States—she returned and entered the port of Liverpool on the 2d of May, 1864, a Confederate vessel of war, with all her armament and complement of officers and crew on board. At the time she thus entered the port of Liverpool, the United States vessels of war, Kearsarge, Niagara, and
p. 33 Sacramento, were cruising off the British and | French coasts in search of her, the Alabama, and other vessels of the rebel confederation. It was resolved at Liverpool that she should be sold. It appeared that Captain Bulloch, an agent of the Confederacy at the port, at first thought of selling her at private sale, together with her full armament; but failing in that, she was advertised for public sale the latter part of May and the

first of June. A certain Edward Bates, a British subject and a merchant of Liverpool, dealing not unfrequently in vessels, attracted by the advertisements, entered into treaty about her. The broker concerned in making a sale of her, testified that ' Bates was desirous of knowing what would buy the ship, but he wished the *armament excluded, as he did not want that.*' According to the statement of Bates himself, it had occurred to him that with her armament on board he might have difficulty in procuring a registry at the customs. All the guns, armament, and stores of that description, were taken out at Birkenhead, her dock when she first entered the port at Liverpool. The vessel had been originally strongly built, her deck especially ; and this was strengthened by supports and stanchions. Though now dismantled, the deck remained as it was ; the traces of pivot guns originally there still remaining. The adaptation of the vessel to her new service cost, it seemed, about £3000. How long she remained in port before she was dismantled was not distinctly in proof, though probably but a few weeks. The sale to Bates was perfected on the 11th June, 1864, by his payment of £15,000, and a bill of sale of the vessel from Bulloch, the agent of the Confederacy. He afterwards fitted her up for the merchant service, and chartered her to the government of Portugal for a voyage to Lisbon, and thence to the Portuguese settlements on the African coast. The testimony failed to show any complicity whatever of Bates with the Confederate purposes. But he had a general knowledge of the Georgia's career and history, testifying in his examination ' that he knew from common report that she had been employed as a Confederate cruiser, but thought that if the United States government had any objection to the sale, they or their officers would have given | some p. 34
public intimation of it, as the sale was advertised in the most public manner.'

The American minister at the court of London, Mr. Adams, who was cognizant of the vessel's history from the beginning, and had kept himself informed of all her movements and changes of ownership, having, on the 14th March, 1863, called the attention of Earl Russell, the British Secretary for Foreign Affairs, to the rule of public law, affirmed by the courts of Great Britain, which rendered invalid the sale of belligerent armed ships to neutrals in time of war, and insisting on its observance during the war of the rebellion, and having remonstrated, on the 9th of May, 1864, against the use made by the Georgia of her Majesty's port of Liverpool, informed him, on the 7th of June following, and just before the completion of the transfer to Bates, that the Federal government declined ' to recognize the validity of the sale of this armed vessel, heretofore engaged in carrying on war against the people of the United States, in a neutral port, and claimed the right of seizing it wherever it may be found on the high seas.' Simultaneously with this note Mr. Adams

addressed a circular to the commanders of the different war vessels of the United States, cruising on seas over which the Georgia was likely to pass in going to Lisbon, informing them that in his opinion 'she might be made lawful prize whenever and under whatever colors she should be found.'[1] Leaving Liverpool on the 8th August, 1864, the vessel was accordingly captured by the United States ship of war Niagara, off the coast of Portugal, on the 15th following, and sent into New Bedford, Massachusetts, for condemnation. A claim was interposed by Bates, who afterwards, on the 31st January, 1865, filed a test affidavit averring that he was the sole owner of the vessel, was a merchant in Liverpool, and a large owner of vessels, that he had fitted out the Georgia at Liverpool for sea, and chartered her to the Portuguese government for a voyage to
p. 35 Lisbon, and thence to | the Portuguese settlements on the coast of Africa, and that while on her voyage to Lisbon in a peaceable manner, she was captured, as already stated.

The proofs in the case were not confined to the documentary evidence found on board the prize, and to the answers to the standing interrogatories *in preparatorio*, but the case was heard before the court below without restriction, and without any objection in it upon additional depositions and testimony, although, so far as the printed transcript of the record before the court showed, no order for further proof had been made. The counsel of both government and claimant, however, had joined in taking the additional testimony, and among the witnesses was Bates himself, whose deposition with its exhibits occupied fifty-six pages out of the one hundred and forty-seven which made the transcript.

The court below condemned the vessel.

Mr. Marvin, for the claimant, appellant in this case :

It was the duty of the court below, and it is the duty of this court now, to hear the case upon the documents found on the vessel, and the depositions *in preparatorio*,[2] as there was no order for further proof, or no other evidence. This is not a mere matter of practice, but it is the very essence of prize law.[3] The case not having been so heard in the court below, and no order for further proof having been granted by the court, all the other depositions should be disregarded by this court. If they are so disregarded, the captors have, we assume it to be plain, no case.

But waiving this, and taking the case as presented on the whole testimony, this question arises : 'Does a neutral, who purchases from one of two belligerents, in good faith and for commercial purposes, in his

[1] Correspondence between Mr. Adams and Earl Russell, and Mr. Adams and Mr. Seward, communicated with the President's messages to the first and second sessions of the Thirty-eighth Congress.

[2] Paper of Sir William Scott and Sir John Nicholl, addressed to his Excellency John Jay, 1 Robinson, Appendix, 390 ; The Haabet, 6 Id. 54.

[3] 3 Phillimore, 594, § 473.

own home port, a vessel lying there, which had been used by such belligerent as a | vessel of war, but which had been disarmed, take a good title p. 36
as against the right of capture of the other belligerent ? '

We think that he does. No principle of international law prohibits a neutral, in his home port, from buying from or selling to any person, any and every species of property. In a home neutral port there is no room for the operation of international interdicts ; nor does international law invalidate any sales made in such port. Indeed, sound policy requires that the enemy should be allowed and even encouraged to sell his naval vessels. They cannot be blockaded in a neutral port, and can escape out of such port when they will. The right to the *chances* of capturing them on the ocean is of much less value to a belligerent than their absence from the ocean would be.

The validity of the purchase of the enemy's merchant ships by a neutral, even where the purchase and transfer have been effected in the enemy's port, under blockade, has been fully recognized.[1] Can this case be distinguished in principle ? We think that it cannot.

Mr. Evarts, Attorney-General, and Mr. Ashton, Assistant Attorney-General, contra :

1. This court is entitled to look into all the proofs found in the record. The depositions, by way of further proof, were obviously taken and introduced into the cause by the agreement and consent of the parties.

2. When a neutral deals with belligerent privates about private property, his dealings are generally lawful ; but when he deals with a belligerent sovereign, when the subject of dealing are public vessels, public funds, public property of any kind, it is unlawful. While neutrals have rights, so too they have obligations ; obligations founded on the rights of belligerents. Thus neutrals cannot give assistance to one belligerent when reduced by the other to distress. Hence it is that a neutral may be captured and condemned if attempting | to run a blockade, p. 37
or if carrying contraband ; and hence, too, that articles not otherwise contraband of war become so when sent to aid an enemy reduced to distress. This is the principle which we seek to apply. Suppose an armed vessel driven into a neutral port by cruisers who lie outside, and who would capture her the moment she came out. In such a case any truly neutral government would refuse to have its ports used as places of refuge. The vessel would have to sail out, and would sail of course into the jaws of capture. But if the hard-pressed enemy can dismantle and sell, how is neutrality maintained ? The purchase-money can be taken at once and applied to other warlike purposes ; to the purchase or building of new ships in new places. The law of nations cannot be charged

[1] The Sechs Geschwistern, 4 Robinson, 100 ; The Vigilantia, 6 Id. 123 ; The Bernon, 1 Id. 102.

with the inconsistency of prohibiting a neutral from permitting the use of his territory by a belligerent as an asylum for his vessels of war, and on the other, of suffering the sale of such vessels within neutral protection, by which the same advantage may be gained by the belligerent as if he had an absolute right to employ the neutral territory as a place of safe resort from his successful enemy. A title may indeed pass in a case of sale like this, but it passes subject to the right of capture.

The Minerva,[1] decided by Sir W. Scott, covers our ground. There was, indeed, some evidence of collusion in that case, but Sir W. Scott undoubtedly intended to say, and did say in that case, that an enemy's vessel of war, lying in a neutral port, was not an object fairly within the range of commercial speculation, and he unquestionably intended to place his judgment of condemnation as well upon this principle, as upon the independent view that, upon the special facts of that case, the purchase was collusive, and had been made with the intent to convey the vessel into the possession of the former belligerent owner. The principle was lately acted upon by that able jurist, Field, J., of the District Court of New Jersey, in the unreported case of *The Etta*, under circumstances much the same as those of the Georgia. |

p. 38 *Reply :*

The Minerva was unlike the present case in many important particulars. It was the case of a pretended purchase of a ship of war, with eighteen guns and ammunition, captured while on her way ostensibly to the port of the purchaser, but really to a port of the enemy ; fourteen guns and ammunition having been taken out for the mere convenience of conveyance. Though the vessel lay at a neutral port, the negotiations for the purchase were carried on at the enemy's port, and the enemy crew and captain were hired there and sent to bring home the ship. She was captured in possession of an enemy master and crew, and while sailing close into the enemy's coast. In fact the vessel was going, under color of purchase and sale, right back again into the enemy's navy. The vessel had not been dismantled, except in part for the convenience of transportation, the purchaser buying guns and ammunition with the vessel. There was no proof in the case that the purchaser had paid for the vessel, or that he had bought her for commercial purposes only. It was the case of a mere colorable purchase. It is true that Sir W. Scott assumes to place the decision of the case on the ground of the illegality of the purchase. But he does so unnecessarily.

Mr. Justice NELSON delivered the opinion of the court.

It is insisted by the learned counsel for the claimant, that all the depositions in the record, except those *in preparatorio*, should be stricken out, or disregarded by the court on the appeal, for the reason that it does

[1] 6 Robinson, 397.

not appear that any order had been granted on behalf of either party to take further proofs. But the obvious answer to the objection is that it comes too late. It should have been made in the court below. As both parties have taken further proofs, very much at large, bearing upon the legality of the capture, without objection, the inference is unavoidable that there must have been an order for the same, or, if not, that the depositions were taken by mutual consent. They were taken on interrogatories and cross-interrogatories, in which the counsel of | both parties p. 39
joined, and, among other witnesses examined, is the claimant himself, whose deposition, with the papers accompanying it, fill more than one-third of the record.

As respects the vessel, we are satisfied, upon the proofs, that the claimant purchased the Georgia without any purpose of permitting her to be again armed and equipped for the Confederate service, and for the purpose, as avowed at the time, of converting her into a merchant vessel. He had, however, full knowledge of her antecedent character, of her armament and equipment as a vessel of war of the Confederate navy, and of her depredations on the commerce of the United States, and that, after having been thus employed by the enemies of this government upwards of a year, she had suddenly entered the port of Liverpool with all her armament and complement of officers and crew on board. He was not only aware of all this, but, according to his own statement, it had occurred to him that this condition of the vessel might afford an objection to her registry at the customs; and before he perfected the sale, he sought and obtained information from some of the officials that no objection would be interposed. He did not apply to the government on the subject.

The claimant states 'that he knew from common report she (the Georgia), had been employed as a Confederate cruiser, but I thought,' he says, 'if the United States government had any objection to the sale, they or their officers would have given some public intimation of it, as the sale was advertised in the most public manner.' If, instead of applying to an officer of the customs for information, the claimant had applied to his government, he would have learned that as early as March 14th, 1863, Mr. Adams, our minister in England, had called the attention of Lord Russell, the foreign secretary, to the rule of public law, as administered by the highest judicial authorities of his government, which forbid the purchase of ships of war, belonging to the enemy, by neutrals in time of war, and had insisted that the rule should be observed and enforced in the war | then pending between this government and the insurgent States. And p. 40
also that he had addressed a remonstrance to the British government on the 9th of May, but a few days after the Georgia had entered the port of Liverpool, against her being permitted to remain longer in that port than the

period specified in her Majesty's proclamation. His own government could have advised him of the responsibilities he assumed in making the purchase. Mr. Adams, after receiving information of the purchase by the claimant, in accordance with his views of public law, above stated, communicated with the commanders of our vessels cruising in the Channel, and expressed to them the opinion that, notwithstanding the purchase, the Georgia might be made lawful prize whenever and under whatever colors she should be found sailing on the high seas.

The principle here assumed by Mr. Adams as a correct one, was first adjudged by Sir William Scott in the case of *The Minerva*,[1] in the year 1807. The head note of the case is : ' Purchase of a ship of war from an enemy whilst lying in a neutral port, to which it had fled for refuge, is invalid.' It was stated in that case by counsel for the claimant, that it was a transaction which could not be shown to fall under any principle that had led to condemnation in that court or in the Court of Appeal. And Sir William Scott observed, in delivering his opinion, that he was not aware of any case in his court, or in the Court of Appeal, in which the legality of such a purchase had been recognized. He admitted there had been cases of merchant vessels driven into ports out of which they could not escape, and there sold, in which, after much discussion and some hesitation of opinion, the validity of the purchase had been sustained. But ' whether the purchase of a vessel of this description, built for war and employed as such, and now rendered incapable of acting as a ship of war, by the arms of the other belligerent, and driven into a neutral port for shelter—whether the purchase of such a ship can be allowed, which shall enable the enemy, so far to secure himself from the disadvan-
p. 41 tage into which he | has fallen, as to have the value at least restored to him by a neutral purchaser,' he said, ' was a question on which he would wait for the authority of the superior court, before he would admit the validity of the transfer.' He denied that a vessel under these circumstances could come fairly within the range of commercial speculation.

It has been insisted in the argument here, by the counsel for the claimant, that there were facts and circumstances in the case of *The Minerva*, which went strongly to show that the sale was collusive, and that, at the time of the capture, she was on her way back to the enemy's port. This may be admitted. But the decision was placed, mainly and distinctly, upon the illegality of the purchase. And such has been the understanding of the profession and of text-writers, both in England and in this country ; and as still higher evidence of the rule in England, it has since been recognized as settled law by the judicial committee of her Majesty's privy council. In the recent learned and most valuable commentaries of Mr. Phillimore (now Sir Robert Phillimore, Judge of the

[1] 6 Robinson, 397.

High Court of Admiralty of England), on international law, he observes, after stating the principles that govern the sale of enemies' ships, during war, to neutrals: 'But the right of purchase by neutrals extends only to merchant ships of enemies, for the purchase of ships of war belonging to enemies is held invalid.' And Mr. T. Pemberton Leigh, in delivering judgment of the judicial committee and lords of the privy council, in the case of *The Baltica*,[2] observes: 'A neutral, while war is imminent, or after it has commenced, is at liberty to purchase either goods or ships (not being ships of war), from either belligerent, and the purchase is valid, whether the subject of it be lying in a neutral port or in an enemy's port.' Mr. Justice Story lays down the same distinction in his 'Notes on the Principles and Practice of Prize Courts,'[1]—a work that has been selected by the British government for the use of its naval officers, as the best code of instruction in the prize law.[2] The same principle is found | in p. 42
Wildman on International Rights in Time of War, a valuable English work published in 1850, and in a still more recent work, Hosack on the Rights of British and Neutral Commerce, published in London in 1854, this question is referred to in connection with sales of several Russian ships of war, which it was said had been sold in the ports of the Mediterranean to neutral purchasers, for the supposed purpose of defeating the belligerent rights of her enemies in the Crimean war, and he very naturally concludes, from the case of *The Minerva*, that no doubt could exist as to what would be the decision in case of a seizure.[3] This work was published before the judgment of the privy council in the case of *The Baltica*, which was a Russian vessel, sold *imminente bello*; being, however, a merchant ship, the purchase was upheld; but, as we have seen from the opinion in that case, if it had been a ship of war it would have been condemned.[4]

It has been suggested that, admitting the rule of law as above stated, the purchase should still be upheld, as the Georgia, in her then condition, was not a vessel of war, but had been dismantled, and all guns and munitions of war removed; that she was purchased as a merchant vessel, and fitted up, *bonâ fide*, for the merchant service. But the answer to the suggestion is, that if this change in the equipment in the neutral port, and in the contemplated employment in future of the vessel, could have the effect to take her out of the rule, and justify the purchase, it would always be in the power of the belligerent to evade it, and render futile the reasons on which it is founded. The rule is founded on the propriety and justice of taking away from the belligerent, not only the power of rescuing his vessel from pressure and impending peril of capture, by escaping into a neutral port, but also to take away the facility which would otherwise

[1] Page 63, Pratt's London edition.
[2] See 11th Moore's Privy Council, 145.
[3] Page 82, note.
[4] See also Lawrence's Wheaton, note 182, p. 561, and *The Etta*, before Field, United States district judge of New Jersey.

exist, by a collusive or even actual sale, of again rejoining the naval force of the enemy. The removed armament of a vessel, built for war, can be
p. 43 readily replaced, | and so can every other change be made, or equipment furnished for effective and immediate service. The Georgia may be instanced in part illustration of this truth. Her deck remained the same, from which the pivot guns and others had been taken ; it had been built originally strong, in order to sustain the war armament, and further strengthened by uprights and stanchions beneath. The claimant states that the alterations, repairs, and outfit of the vessel for the merchant service, cost some £3000. Probably an equal sum would have again fitted her for the replacement of her original armament as a man of war.

The distinction between the purchase of vessels of war from the belligerent, in time of war, by neutrals, in a neutral port, and of merchant vessels, is founded on reason and justice. It prevents the abuse of the neutral by partiality towards either belligerent, when the vessels of the one are under pressure from the vessels of the others, and removes the temptation to collusive or even actual sales, under the cover of which they may find their way back again into the service of the enemy.

That the Georgia, in the present case, entered the port of Liverpool to escape from the vessels of the United States in pursuit, is manifest. The steam frigates Kearsarge, Niagara, and Sacramento were cruising off the coast of France and in the British Channel, in search of this vessel and others that had become notorious for their depredations on American commerce. It was but a few days after the purchase of the Georgia by the claimant, the Alabama was captured in the Channel, after a short and brilliant action, by the Kearsarge. The Georgia was watched from the time she entered the port of Liverpool, and was seized as soon as she left it.

The question in this case cannot arise under the French code, as, according to that law, sales even of merchant vessels to a neutral, *flagrante bello*, are forbidden. And it is understood that the same rule prevails in Russia. Their law, in this respect, differs from the established English and American adjudications on this subject.

p. 44 It may not be inappropriate to remark, that Lord Russell | advised Mr. Adams, on the day the Georgia left Liverpool under the charter-party to the Portuguese government, August 8th, 1864, her Majesty's government had given directions that, ' In future, no ship of war, of either belligerent, shall be allowed to be brought into any of her Majesty's ports for the purpose of being dismantled or sold.'

DECREE AFFIRMED.

The Siren.

(7 Wallace, 152) 1868.

. A claim for damages *exists* against a vessel of the United States guilty of a maritime tort, as much as if the offending vessel belonged to a private citizen. And although, for reasons of public policy, the claim cannot be enforced by direct proceedings against the vessel, yet it will be enforced, by the courts, whenever the property itself, upon which the claim exists, becomes, through the affirmative action of the United States, subject to their jurisdiction and control. The government, in such a case, stands, with reference to the rights of the defendants or claimants, as do private suitors, except that it is exempt from costs, and from affirmative relief against it, beyond the demand or property in controversy.

2. By the admiralty law, all maritime claims upon the vessel extend equally to the proceeds arising from its sale, and are to be satisfied out of them.

These principles were thus applied :

A prize ship, in charge of a prize master and crew, on her way from the place of capture to the port of adjudication, committed a maritime tort by running into and sinking another vessel. Upon the libel of the government, the ship was condemned as lawful prize, and sold, and the proceeds paid into the registry. The owners of the sunken vessel, and the owners of her cargo, thereupon intervened by petition, asserting a claim upon the proceeds for the damages sustained by the collision : *Held*, that they were entitled to have their damages assessed and paid out of the proceeds before distribution to the captors.

3. The District Court of the United States, sitting as a prize court, may hear and determine all questions respecting claims arising *after* the capture of the vessel.

APPEAL from the District Court for Massachusetts.

The steamer Siren was captured in the harbor of Charleston in attempting to violate the blockade of that port, in February, 1865, by the steamer Gladiolus, belonging to the navy of the United States. She was placed in charge of a prize master and crew, and ordered to the port of Boston | for p. 153
adjudication. On her way she was obliged to put into the port of New York for coal, and, in proceeding thence through the narrow passage which leads to Long Island Sound, known as Hurlgate, she ran into and sank the sloop Harper, loaded with iron, and bound from New York to Providence, Rhode Island. The collision was regarded by this court, on the evidence, as the fault of the Siren.

On the arrival of the steamer at Boston, a libel in prize was filed against her, and no claim having been presented, she was, in April following, condemned as lawful prize, and sold. The proceeds of the sale were deposited with the assistant treasurer of the United States, in compliance with the act of Congress, where they now remain, subject to the order of the court.

In these proceedings the owners of the sloop Harper, and the owners of her cargo, intervened by petition, asserting a claim upon the vessel and her proceeds, for the damages sustained by the collision, and praying that their claim might be allowed and paid out of the proceeds.

The District Court held that the intervention could not be allowed, and dismissed the petition; and hence the present appeals.

Mr. Ashton, Assistant Attorney-General of the United States, argued the case fully, upon principles and authority, maintaining the correctness of the decree below upon several specific grounds, resolvable into these two general ones:

1st. That to allow the intervention would be, in substance, to allow the citizen to implead the government, which, he asserted, was universally repugnant to settled principles; and,

2d. That the question as to a claim upon a prize ship, created after capture, was not within the jurisdiction of a prize court, which, he contended, can deal only with the question of prize or no prize.

Mr. Causten Browne, contra.

Mr. Justice FIELD delivered the opinion of the court.

p. 154 It is a familiar doctrine of the common law, that the | sovereign cannot be sued in his own courts without his consent. The doctrine rests upon reasons of public policy; the inconvenience and danger which would follow from any different rule. It is obvious that the public service would be hindered, and the public safety endangered, if the supreme authority could be subjected to suit at the instance of every citizen, and consequently controlled in the use and disposition of the means required for the proper administration of the government. The exemption from direct suit is, therefore, without exception. This doctrine of the common law is equally applicable to the supreme authority of the nation, the United States. They cannot be subjected to legal proceedings at law or in equity without their consent; and whoever institutes such proceedings must bring his case within the authority of some act of Congress. Such is the language of this court in *United States* v. *Clarke*.[1]

The same exemption from judicial process extends to the property of the United States, and for the same reasons. As justly observed by the learned judge who tried this case, there is no distinction between suits against the government directly, and suits against its property.

But although direct suits cannot be maintained against the United States, or against their property, yet, when the United States institute a suit, they waive their exemption so far as to allow a presentation by the defendant of set-offs, legal and equitable, to the extent of the demand made or property claimed, and when they proceed *in rem*, they open to consideration all claims and equities in regard to the property libelled. They then stand in such proceedings, with reference to the rights of defendants or claimants, precisely as private suitors, except that they are exempt from costs and from affirmative relief against them, beyond the demand or property in controversy. In *United States* v. *Ringgold*,[2] a claim

[1] 8 Peters, 444. [2] 8 Peters, 150.

of the defendant was allowed as a set-off to the demand of the government. 'No direct suit,' said the court, 'can be maintained against the United States. | But when an action is brought by the United States to recover p. 155
moneys in the hands of a party who has a legal claim against them, it would be a very rigid principle to deny to him the right of setting up such claim in a court of justice, and turn him round to an application to Congress.' So in *United States* v. *Macdaniel*,[1] to which reference is made in the case cited, the defendant was allowed to set off against the demand of the government a claim for services as agent for the payment of the navy pension fund, to which the court held he was equitably entitled. The question, said the court, was, whether the defendant should surrender the money which happened to be in his hands, and then petition Congress on the subject; and it was held that the government had no right, legal or equitable, to the money.

For the damages occasioned by collision of vessels at sea a claim is created against the vessel in fault, in favor of the injured party. This claim may be enforced in the admiralty by a proceeding *in rem*, except where the vessel is the property of the United States. In such case the claim exists equally as if the vessel belonged to a private citizen, but for reasons of public policy, already stated, cannot be enforced by direct proceedings against the vessel. It stands, in that respect, like a claim against the government, incapable of enforcement without its consent, and unavailable for any purpose.

In England, when the damage is inflicted by a vessel belonging to the crown, it was formerly held that the remedy must be sought against the officer in command of the offending ship. But the present practice is to file a libel *in rem*, upon which the court directs the registrar to write to the lords of the admiralty requesting an appearance on behalf of the crown—which is generally given—when the subsequent proceedings to decree are conducted as in other cases.[2] In the case of *The Athol*,[3] the court refused to issue a monition to the lords of the admiralty to appear in a suit for damage by collision, occasioned to a vessel by a ship of | the crown; but p. 156
the lords having subsequently directed an appearance to be entered, the court proceeded with the case, and awarded damages. As no warrant issues in these cases for the arrest of the vessels of the crown, and no bail is given on the appearance, it is insisted that they are brought simply to ascertain the extent of the damages, and that the decrees are little more than awards, so far as the government is concerned. This may be the only result of the suits, but they are instituted and conducted on the hypothesis that claims against the offending vessels are created by the collision.[4] The vessels are not arrested and taken into custody by the marshal, for

[1] 7 Peters, 16.
[2] Coote's New Admiralty Practice, 31.
[3] 1 W. Robinson, 382.
[4] The Clara, 1 Swabey, 3; and the Swallow, Ib. 30.

the reasons of public policy already stated, and for the further reason that it is to be presumed that the government will at once satisfy a decree rendered by its own tribunals in a case in which it has voluntarily appeared.

It is true, that in case of damage committed by a public vessel a legal responsibility attaches to the actual wrongdoer, the commanding officer of the offending ship, and the injured party may seek redress against him ; but this is not inconsistent with the existence of a claim against the vessel itself. In the case of *The Athol*, already referred to, where the liability of the actual wrongdoer is asserted, damages against the vessel were pronounced after an appearance on behalf of the crown had been given by the admiralty proctor.[1]

The inability to enforce the claim against the vessel is not inconsistent with its existence.

Seamen's wages constitute preferred claims, under the maritime law, upon all vessels ; yet they cannot be enforced against a vessel of the nation, or a vessel employed in its service. In a case before the Admiralty Court of Pennsylvania, in 1781, it was adjudged, on a plea to the jurisdiction, that mariners enlisting on board a ship of war belonging to a sovereign independent State could not libel the ship for their wages. |

p. 157 In a case in the English Admiralty Court, a libel having been filed to enforce a claim for seamen's wages against a packet ship employed in the service of the General Post Office, Sir William Scott declined to take jurisdiction until notice was given to the Post Office Department, and he was informed that no objection was taken to the proceedings.[2] The fact that the court took jurisdiction when the exemption, upon which the government could insist, was waived, shows that a claim against the vessel existed, as only upon its existence could the libel in any event be sustained.

Even where claims are made liens upon property by statute, they cannot be enforced by direct suit, if the property subsequently vest in the government. Thus in Massachusetts the statutes provide, that any person to whom money is due for labor and materials furnished in the construction of a vessel in that commonwealth, shall have a lien upon her, which shall be preferred to all other liens except mariners' wages, and shall continue until the debt is paid, unless lost by a failure to comply with certain specified conditions ; yet in a recent case, where a vessel subject to a lien of this character was transferred to the United States, it was held that the lien could not be enforced in the courts of that State. The decision was placed upon the general exemption of the government and its property from legal process.[3]

[1] See, also, United States *v.* Brig Malek Adhel, 2 Howard, 233.
[2] The Lord Hobart, 2 Dodson, 103.
[3] Briggs and another *v.* Light Boats, 11 Allen, 157.

So also express contract liens upon the property of the United States are incapable of enforcement. A mortgage upon property, the title to which had subsequently passed to the United States, would be in the same position as a claim against a vessel of the government, incapable of enforcement by legal proceedings. The United States, possessing the fee, would be an indispensable party to any suit to foreclose the equity of redemption, or to obtain a sale of the premises. In *Lutwich* v. *The Attorney-General*, a case cited by Lord Hardwicke in deciding *Reeve* v. *Attorney-General*,[1] a bill was filed to foreclose a mortgage after the mortgagor | had been p. 158
attainted for high treason, and the court refused a foreclosure against the crown, but directed that the mortgagee should hold and enjoy the mortgaged premises until the crown thought proper to redeem the estate.

In *Hodge* v. *Attorney-General*,[2] the deeds of certain leasehold estates had been deposited by one Bailey with the plaintiffs, who were bankers, to secure a balance of a running account between him and them. Bailey was afterwards convicted of felony, and the leasehold estates vested in the crown. At the time of his conviction he was indebted to the plaintiffs, who filed a bill against the attorney-general, claiming to be equitable mortgagees of the leasehold estates, to subject the property to sale, and the application of the proceeds to the payment of the amount due them. But the court said that the only decree which could be made in the case was to declare the plaintiffs to be equitable mortgagees of the property, to direct an account to be taken, and that the plaintiffs hold possession of the property until their lien was satisfied. 'I do not think,' said Baron Alderson, in giving the decision, 'that I have any jurisdiction in this case to order a sale. Here the legal estate is vested in the crown; and I do not know any process by which this court can compel the crown to convey that legal estate.'

In this country, where, as a general rule, a mortgage is treated only as a lien or incumbrance, and the mortgagor retains possession of the premises, the relief granted in the two cases cited would be of no avail.

The authorities to which we have referred are sufficient to show that the existence of a claim, and even of a lien upon property, is not always dependent upon the ability of the holder to enforce it by legal proceedings. A claim or lien existing and continuing will be enforced by the courts whenever the property upon which it lies becomes subject to their jurisdiction and control. Then the rights and interests of all parties will be respected and maintained. Thus, if the government, having the title to land subject to the | mortgage of the previous owner, should transfer p. 159
the property, the jurisdiction of the court to enforce the lien would at once attach, as it existed before the acquisition of the property by the government.

[1] Atkyns, 223. [2] 3 Younge & Collyer, 342.

So if property belonging to the government, upon which claims exist, is sold upon judicial decree, and the proceeds are paid into the registry, the court would have jurisdiction to direct the claims to be satisfied out of them. Such decree of sale could only be made upon application of the government, and by its appearance in court, as we have already said, it waives its exemption and submits to the application of the same principles by which justice is administered between private suitors.

Now, it is a settled principle of admiralty law, that all maritime claims upon the vessel extend equally to the proceeds arising from its sale, and are to be satisfied out of them. Assuming, therefore, that the Siren was in fault, and that by the tort she committed a claim was created against her, we do not perceive any just ground for refusing its satisfaction out of the proceeds of her sale. The government is the actor in the suit for her condemnation. It asks for her sale, and the proceeds coming into the registry of the court, come affected with all the claims which existed upon the vessel created subsequent to her capture. There is no authority, that we are aware of, which would exempt them under these circumstances, because of the exemption of the government from a direct proceeding *in rem* against the vessel whilst in its custody.

This doctrine was applied by this court in the case of the *St. Jago de Cuba*,[1] where a libel was filed by the United States to forfeit the vessel for violation of the laws prohibiting the slave trade. Claims of seamen for wages, and of material-men for supplies, when the parties were ignorant of the illegal voyage of the vessel, were allowed and paid out of the proceeds. These claims arose subsequent to the illegal acts which created the
p. 160 forfeiture, yet they were not | superseded by the claim of the government. 'In case of wreck and salvage,' said the court, 'it is unquestionable that the forfeiture would be superseded; and we see no ground on which to preclude any other maritime claim fairly and honestly acquired.' This language, though used with reference to claims arising out of contract, may be applied to claims arising out of torts committed after the capture of the offending vessel.

In *United States* v. *Wilder*[2] it was held that goods of the United States were subject to contribution equally with goods of private shippers, to meet the expenses incurred in saving them, which were averaged, and that the owners of the vessel could retain the goods, until their share of the contribution to the average was paid or secured. The United States claimed the right to take the goods without paying or securing this share; and this being denied, the action was brought to recover their value. In delivering the opinion, Mr. Justice Story stated that he was unable to distinguish the case from one of salvage, and that it had never been doubted that in cases of salvage of private ships and

[1] 9 Wheaton, 409. [2] 3 Sumner, 308.

cargoes, the freight on board belonging to the government was equally subject to the admiralty process *in rem* for its proportion due for salvage with that of mere private shippers; but that it might be, for aught he knew, different in cases of the salvage of public ships. 'The same reasoning, however,' continued the learned justice, 'which has been applied by the government against the lien for general average, applies with equal force against the lien for salvage of government property under all circumstances. Besides, it is by no means true, that liens existing on particular things are displaced by the government becoming, or succeeding to the proprietary interest. The lien of seamen's wages and of bottomry bonds exists in all cases as much against the government, becoming proprietors by way of purchase, of forfeiture, or otherwise, as it does against the particular things in the possession of a private person.' |

In the case of *The Schooner Davis and Cargo*, recently decided in the p. 161
Circuit Court of the United States for the Southern District of New York, cotton belonging to the United States was held liable to contribution to meet the allowance made for salvage services in saving vessel and cargo. 'This mere fact,' said the court, 'of the ownership of the cotton by the government, in the act of being carried to its port of destination for the purposes of a market as merchandise, we think did not exempt it from the lien in case of salvage service. We shall not enter into an argument in support of the position, as the subject, or rather a kindred one—the liability of property of the government for general average—and the present question incidentally have been already most elaborately examined by Mr. Justice Story.[1] We are inclined, also, to the opinion, that it is the doctrine of the admiralty in England,[2] and of the most approved modern elementary writers on the subject in this country.'[3]

There is no just foundation for the objection that claims for maritime torts cannot be dealt with and adjusted by a prize court. 'It is a principle well settled, and constantly conceded and applied,' said Chancellor Kent, 'that prize courts have exclusive jurisdiction and an enlarged discretion as to the allowance of freight, damages, expenses, and costs in all cases of captures, and as to all torts, and personal injuries, and ill-treatments, and abuse of power connected with captures *jure belli*; and the courts will frequently award large and liberal damages in those cases.'[4] The jurisdiction is not, therefore, limited to the determination of the simple question of prize or no prize. But whatever may be the limitation upon the jurisdiction of a prize court in England, there is no such limitation upon the District Court sitting as a prize court in this country. Here,

[1] 3 Sumner, 308.
[2] 3 Haggard, 246.
[3] 1 Parsons's Maritime Law, 324: 2 Ib. 625; Marvin on Wrecks and Salvage, § 122; see, also, 7 Wheaton, 283.
[4] 1 Kent, 354.

the District Court, as was said in *United States* v. *Weed*,[1] 'holds both its | p. 162 prize jurisdiction and its jurisdiction as an instance court of admiralty from the Constitution and the acts of Congress, and is but one court with these different branches of admiralty jurisdiction, as well as cognizance of other and distinct subjects.' It may, therefore, hear and determine all questions respecting claims arising after the capture of the vessel. Outstanding claims upon the vessel, existing previous to the capture, cannot be considered. This exclusion rests not on the ground of any supposed inability of the court to pass upon these claims correctly, but because they are superseded by the capture.[2]

As to the suggestion that a maritime tort, committed by a ship in possession of a prize master and crew, ought not to create a claim on the vessel against a neutral owner in case the vessel is restored, it is sufficient to say, although the vessel having been condemned the question is not of importance in this case, that the claim in that event, if held to exist, would not be the subject of consideration by the prize court. Here, however, the title was divested from the previous owner by the capture, that being lawful, and vested in the United States (in trust as to one-half for the captors), although the legality of the capture was not established until the sentence of condemnation.

It does not appear that the court below considered the evidence as to the character and extent of the alleged tort. It appears to have placed its decision entirely upon the legal proposition, that the captured vessel was exempt from legal process at the suit of the intervenors, and that consequently the proceeds of the vessel could not be subjected to the satisfaction of their claims. We have, however, looked into the evidence, and are satisfied that the collision was the fault of the Siren. It took place in the daytime. The sloop was seen from the steamer in time to avoid her. The steamer was out of the regular track for steamers passing through Hurlgate. The passage is noted for its difficulties and | p. 163 dangers, and, under the laws of New York, pilots are specially commissioned to take vessels through it. The prize master engaged a pilot for the Sound to take the steamer from New York to Boston, but refused to engage a Hurlgate pilot, his reason being to avoid expense. With such a pilot she would have been taken in the regular track of steamers northward of Blackwell's Island, and so close to Flood Rock as to avoid the sloop, as might easily have been done. We do not think it important to cite from the evidence in vindication of our conclusion, especially as it was not seriously contested on the argument that the Siren was responsible for the collision.

[1] 5 Wallace, 69.

[2] The Battle, 6 Wallace, 498; The Hampton, 5 Ib. 372; and The Frances, 8 Cranch, 418.

The decree must be REVERSED, and the cause remanded to the court below, with directions to assess the damages and pay them out of the proceeds of the vessel before distribution to the captors.

ORDERED ACCORDINGLY.

Mr. Justice NELSON, dissenting.

I am unable to concur in the opinion just delivered. The steamer Siren, having been captured by the United States steamship Gladiolus, a government vessel of war, *jure belli*, became the property of the United States, subject only to the right of the claimant to have the question of the legality of the capture determined by the prize court to which it was sent for condemnation. Captures made by government vessels belong to the government, and no title exists in the captors, except to their distributive shares of the proceeds after condemnation.[1]

I agree that the Siren, while on her way, after capture, under the charge of the prize master, was in fault in the collision with the sloop Harper, on her passage from the East River into the Sound, and that, if she had belonged to a private owner, she would have been liable, in the admiralty, for all the damages consequent upon this fault. Nor do I make any question as to a lien for the damages against the | vessel p. 164 in such a case, and which may be enforced by a proceeding *in rem*; or may be by a petition to the court against the proceeds, in the registry, if, for any cause, the offending vessel has been sold, and no prior lien exists against these proceeds. But if the owner of the offending vessel is not liable at all for the collision, it follows, as a necessary legal consequence, that there can be no lien, otherwise the non-liability would amount to nothing. It would be idle to say that the owner was not liable for the wrong, and at the same time subject his vessel for the damages occasioned. In this case, therefore, before a lien can be established or enforced against the Siren by a proceeding *in rem*, for the fault in question, or, which is the same thing, before it can be applied to the proceeds of the vessel in the registry, it must first be shown that the United States, the owner, is legally liable for the collision. In saying legally liable, I do not mean thereby legally liable to a suit; but legally liable upon common law principles in case a suit might have been maintained against the government; in other words, legally liable for the wrongful acts of her officers or public agents. That, in my judgment, is the turning-point in this case, and the principle is as applicable to the proceeds of the Siren in the registry as to the vessel itself. If the government is not responsible, upon the principles of the common law, for wrongs committed by her officers or agents, then, whether the proceedings in the admiralty are against the vessel, or its proceeds, the court is bound to dismiss them.

[1] Dos Hermanos, 10 Wheaton, 306; The Aigburth, Blatchford's Prize Cases, 635; The Adventure, 8 Cranch, 226.

Now, no principle at common law is better settled than that the government is not liable for the wrongful acts of her public agents. Judge Story, in his work on Agency, states it as follows: 'It is plain,' he observes, 'that the government itself is not responsible for the misfeasances, or wrongs, or negligences, or omissions of duty of the subordinate officers or agents employed in the public service; for it does not undertake to guarantee to any persons the fidelity of any of the officers or agents whom it employs, since that would involve it in all its operations in endless embarrassments, and difficulties, and losses, p. 165 which would be subversive | of the public interests.' When we take into view the multitude of public officers and agents, which the government is obliged to employ in conducting its affairs, the soundness, propriety, and even necessity of this principle become at once apparent. In our judgment the present case falls directly within it. In all these cases of wrongs committed by public officers or agents, the legal responsibility attaches to the actual wrongdoer.

It is supposed that the liability of government property for salvage or general average contribution, for services or sacrifices, in cases of impending danger to the property, afford some authority for the judgment in the present case. We are unable to perceive any analogy to the principle we have been discussing. There a portion of the property is taken, or appropriated, as a compensation for saving it from a peril that threatened the loss of the whole. The cases involve no principle concerning the liability of the government for the tortious acts of its public officers.

Great stress is laid also upon the circumstance that the United States is the libellant, and has brought the offending vessel or its proceeds into court, and that the proceeding against the fund in the registry is not a suit against the government. But the answer to this is not that the proceeding may not be taken against the fund in the registry, although there is certainly some difficulty in distinguishing between that and a proceeding against the vessel itself, but that the fund which belongs to the government is not liable at all for the wrongful acts of its officers, which wrongful acts lie at the foundation of the judgment rendered in the case. It is for this principle I contend, and for which I am compelled to dissent from the judgment.

The Diana.

(7 Wallace, 354) 1868.

To justify a vessel of a neutral in attempting to enter a blockaded port, she must be in such distress as to render her entry a matter of absolute and uncontrollable *necessity*.

APPEAL from a decree of the District Court for the Southern District of Florida.

The schooner Diana was captured, on the 26th of November, 1862, by vessels of war of the United States, off Pass Cavallo, on the coast of Texas, then in rebellion against the United States, and, for some time previously, under blockade along the whole line of its coast, and taken to Key West for adjudication.

A libel in prize was filed against both vessel and cargo, in the District Court for the Southern District of Florida, in December, 1862, to which the master of the vessel interposed a claim in behalf of John Cabada, of Campeachy, Mexico, the alleged owner of the schooner, and in behalf of Miguel Canno, a Spanish subject residing at Campeachy, the alleged owner of the cargo. Subsequently a claim was filed by Idela Cabada, alleging that he was owner of the vessel, and that he had let her to one Miguel Canno on freight for a voyage from Campeachy to Matamoras, Mexico, in good faith.

The ship's papers showed that the vessel was on a voyage from Campeachy to Matamoras, and was consigned to one San Roman, at the port last named. She set sail on the 11th November, 1862. |

When captured the vessel was near the port of Matagorda, off the p. 355
coast of Texas. She was fourteen days from Campeachy, and was two hundred miles out of her direct course, having deviated therefrom on the third day out from Campeachy.

The master, in his deposition taken *in preparatorio*, testified that 'the first port the vessel would have entered had she not been captured would have been the nearest convenient port of entrance, and the second would have been Matamoras,' and 'that for twenty-four hours previous to the capture the ship was steering toward the coast of Texas, in hopes to make a harbor, or beach, or something.'

One of the seamen found on board testified that but for our capture 'the vessel would have entered first the port of Cavallo,' and that 'they were running along the coast for an entrance, and that at the time of the capture the captured vessel was only some three miles from the light-house on Pass Cavallo Point.'

In excuse for the position in which the vessel was found it was alleged that when three days out from Campeachy damage had resulted to the rigging of the vessel, causing her to deviate from her course, and that

the master approached the coast 'from no other motive than that of seeking shelter to repair the damage of his vessel.'

The log-book, which had perhaps a somewhat elaborate and artificial aspect, stated that there had been a good deal of heavy weather; that the vessel worked much; that when three days out from Campeachy she 'broke the clamp of the peak of the foresail,' which it was necessary to wait till daylight to repair, but which then, at six o'clock in the morning, was repaired, the wind then being favorable, as it was generally, for going to Matamoras; that on the 15th she broke the bobstay of the bowsprit; and that 'a lashing of rope was made to secure the said bowsprit, having no better means,' and that sail was then made with double reefs. It indicated, generally speaking, variable weather, sometimes heavy, sometimes fine; that the vessel, however, required the pumps to be not
p. 356 unfrequently at work; that on the | 25th she became uncertain about her longitude, and that on that day, under light variable winds, she 'luffed all that was possible, for the purpose of finding soundings and determining our longitude, and by that means to enable us to make a straight course for our port of destination, or some port near by, where we might repair the damages sustained by the vessel and her rigging.' Twenty-four hours afterwards she was captured, being, as already stated, now off the Texan port of Matagorda.

The following letter of instructions, from the owner of the vessel and the owner of the cargo to the master, was found among his papers.

[Translation.]

CAMPEACHY, November 10th, 1862.

DN. PEDRO JAUREQUIBERRY, present.

DEAR SIR AND FRIEND: We think it advisable to hand you this letter of instructions, in order that you may remember with greater facility and precision the objects of the voyage to be undertaken to-day by our pilot-boat 'Diana,' of which vessel you are master.

You have ample authority to dispose of the goods which are on board of the vessel, and to invest the proceeds in *the article* which we have mentioned to you *verbally*, not forgetting that our wishes as well as your personal interest consist in making the most of the article referred to.

Although the vessel goes consigned to Dn. Jose San Roman, you will do what you consider best for our interest. You should not disburse any money while you are able to make purchases from the proceeds of the invoice, and of such ship's stores as you can conveniently dispense with after reserving a sufficient quantity for the return voyage.

As we are embittered by the war which France has declared against the republic, upon the return voyage you will touch at Sisal or Celestun, where you will receive our instructions.

You will keep an accurate account of all moneys disbursed by you, in order that we may determine whether to continue or not these expe-

ditions. We omit any further instructions which we | might give, having p. 357
full confidence in your intelligence and activity.

We conclude by wishing you a safe voyage, and by acknowledging ourselves

Your friends, &c.,
CANNO & CABADA.

The cargo of the Diana consisted in part of rice, starch, coarse flannel, paper, nails, rum, brandy, shoes, and segars; articles which were nearly or quite as abundant at Matamoras as at Campeachy, but which were greatly needed in Texas, at the time, as already said, under blockade by the United States.

There was on board, apparently as a passenger, an Englishman, whose name appeared in the ship's papers as George Stites, but whose real name was George Chase, and who was a pilot, and a resident of Lavacca, Texas.

Acting Master Atkinson, of the United States Navy, in his deposition, taken by leave of court, testified that when he boarded the Diana, her master said that his purpose was to run the blockade; that he had before attempted to do so at St. Louis Pass and did not succeed, and that the same statement was made to him by the pilot of the Diana, who was part owner of the cargo.

Acting Master Samson, also of the United States Navy, in his deposition testified that Chase, the ostensible passenger on board, and who was part owner of the cargo, stated that he was engaged to act as her pilot in entering Matagorda Bay, or any other convenient port of Texas, and that the vessel was intended to violate the blockade; and that Chase made a written acknowledgment to this effect, in presence of several witnesses.

On the hearing, it was brought to the notice of the court that a person of the same name with the captain of the Diana, and residing at the same place, commanded the schooner Sea Witch, which was captured off the coast of Texas for an alleged intention to violate the blockade, and was restored to her owner upon the ground that while on a voyage from | Matamoras to New Orleans, she was driven out of course by heavy weather p. 358
and had been damaged;[1] the same excuse which is offered in this case.

The District Court decreed restitution, and from the decree the United States appealed.

Mr. Ashton, Assistant Attorney-General, for the United States, relied upon the very suspicious facts disclosed by the case upon the position of the vessel, so far out of her proper course, and upon the circumstance, very remarkable if the case was one of innocence, that the captain of the vessel had been recently found on *another* vessel, in exactly the same

[1] 6 Wallace, 242.

unfortunate circumstances as he now invoked the interest of the court for, in the case of the Diana. He was not a *novus hospes* in this tribunal.

No opposing counsel.

Mr. Justice FIELD delivered the opinion of the court.

The schooner Diana was captured, in November, 1862, off Cavallo, near the entrance of Matagorda Bay, on the coast of Texas. According to her papers, she was on a voyage from Campeachy, in Mexico, to Matamoras, at the mouth of the Rio Grande ; but at the time of her capture she had been fourteen days at sea and had passed two hundred miles beyond her alleged port of destination. We have no doubt that she was then seeking to enter a blockaded port on the coast. The master states in his deposition that the vessel, if she had not been captured, would have first entered the nearest convenient port, and afterwards gone to Matamoras, and that for twenty-four hours previous to her capture he was steering the vessel toward the coast in hopes of making a harbor or a beach. One of the seamen testifies that the vessel was running along the coast for an entrance ; that at the time of her capture she was only three miles from the lighthouse on Pass Cavallo Point, and but for the capture would have entered the port of Cavallo. |

p. 359 Nor do we doubt that it was the object of the voyage to trade with the enemy, and for that purpose that the owners of the vessel and cargo intended to violate the blockade. The excuse offered by the master for the position in which the vessel was found—that she had been injured by stress of weather, and he was approaching the coast with no other motive than that of seeking shelter to repair the damage—is inconsistent with various facts developed by the evidence.

In the first place, the papers of the vessel purport that she was consigned to one San Roman, at Matamoras, but the instructions from the owners of both vessel and cargo show that this consignment was colorable, and that the master was the real consignee. He was clothed with full authority to dispose of the goods on board, and to invest the proceeds in what is very mysteriously termed *the article*, which they had mentioned to him *verbally*. The article to which allusion is thus made, was cotton, which it was undoubtedly the object of the voyage to procure.

In the second place, the articles which composed the cargo were as abundant and cheap at Matamoras as at Campeachy, whilst they were in great demand and of high price in the country occupied by the enemy.

In the third place, the vessel had on board, ostensibly as a passenger, but under a fictitious name, an Englishman, who was a pilot, and a resident of Lavacca, a town at the head of Matagorda Bay, for which the vessel was evidently directing her course when captured.

Besides these considerations, which are sufficient of themselves to justify the conclusion that a violation of the blockade was in the original

intention of the owners of vessel and cargo before the vessel sailed from Campeachy, it was admitted by the master at the time of the capture that it was his purpose to run the blockade, and that he had before attempted, without success, to do so at St. Louis Pass. The Englishman on board, who joined the vessel at Campeachy, also stated that he was engaged to act as pilot of the vessel to enter Matagorda Bay, or any other convenient port of Texas. |

The blockade of the coast of Texas had been established long before p. 360
the vessel sailed from Campeachy, and its existence was generally known. It is proved that it was known to the owners and master of the captured vessel.

There is another circumstance which may be adverted to in this connection. The master of this vessel was also the master of the Sea Witch, which was captured off the coast of Texas for an attempt to violate the blockade, and was released upon the ground, that whilst on a voyage from Matamoras to New Orleans she was driven out of her course by stress of weather and injuries received—an excuse similar to the one offered in this case.[1] This circumstance the court will take notice of, and it will justify a rigid scrutiny into the character of the exculpating testimony produced by the master in the present case. Such is the language of the adjudged cases.[2]

The statement of the master as to the extent of injuries which the vessel had received is not supported by the log-book. The injuries which are shown by its entries were not of a very serious character—such as would endanger the safety of the vessel. Much less do the entries show the necessity of any deviation of the vessel from a direct course to Matamoras. The statement is, that she deviated from such course on the third day out from Campeachy, because the sea and wind were heavy, and the rigging of the vessel had been damaged. The log-book shows that the damage was repaired the following morning, and on the next day that the wind was fair for sailing in a direct course to Matamoras, and so continued nearly all the time up to the capture.

It is undoubtedly true that a vessel may be in such distress as to justify her in attempting to enter a blockaded port. She may be out of provisions or water, or she may be in a leaking condition, and no other port be of easy access. The case, however, must be one of absolute and uncontrollable necessity; and this must be established beyond reasonable | doubt. 'Nothing less,' says Sir William Scott, 'than an uncontrollable p. 361
necessity, which admits of no compromise, and cannot be resisted,' will be held a justification of the offence. Any rule less stringent than this would open the door to all sorts of fraud. Attempted evasions of the

[1] 6 Wallace, 242.
[2] The Juffrouw Elbrecht, 1 Robinson, 127; The Experiment, 8 Wheaton, 261.

blockade would be excused upon pretences of distress and danger, not warranted by the facts, but the falsity of which it would be difficult to expose.

The decree of the court below must be REVERSED, and that court directed to enter a decree condemning the vessel and cargo as lawful prize; and it is

SO ORDERED.

The Cotton Plant.

(10 Wallace, 577) 1870.

A capture made within the State of North Carolina on the Roanoke River, 130 miles from its mouth, by a naval force detached from two steamers that had proceeded up the river, one about 80 miles and the other about 100, where they stopped in consequence of the crookedness of the stream and apprehensions of low water, held to be a capture upon 'inland waters' of the United States, as that phrase is used in the act of Congress of July 2, 1864 (13 Stat. at Large, 377), and therefore not to be regarded as maritime prize.

APPEAL from the District Court for the Eastern District of Pennsylvania, condemning as prize the steamer Cotton Plant, and her cargo; the case was thus:

An act of Congress of July 2, 1864, passed during the late rebellion, enacts that 'no property seized or taken upon *any* of the inland waters of the United States by the naval forces thereof shall be regarded as maritime prize;' and directs that all property so seized or taken shall be promptly delivered to the officers of the courts, to be dealt with in a way which the act prescribes.

The capture, which was the subject of this libel, took place on the *10th day of May*, 1865, in North Carolina, at the mouth of Quankey Creek,
p. 578 on the Roanoke River, about half a mile | below Halifax, and about 130 miles above Plymouth, which lies at the mouth of the river, where the river falls into Albemarle Sound; the river at that point being narrow and shallow. An expedition, consisting of the United States steamers Ioscoe and Valley City, with a picket launch, went up the Roanoke River. The Ioscoe proceeded to Hamilton, which was 50 miles from the place of capture; the Valley City went up the river to a point 32 miles from the place of capture; both vessels stopping at the places were they did on account of the winding course of the stream and from fear of getting aground. An officer and six men were placed on the picket launch, attended by an armed crew from the Ioscoe. The launch, with these crews, proceeded up the river to the place of capture, and there seized the steamer with her cargo then on board, cotton chiefly, and putting on her some other cotton that they brought from a barn on land, recently landed from this same steamer and put in the barn for temporary safe keeping

until reladed, sent her to Philadelphia, where she was libelled in the District Court and condemned, as already mentioned.

Her owners appealed to this court. There was no allegation of any breach of blockade.

Messrs. W. L. Hirst and T. R. Elcock, for the appellants :

It is matter of public history that Lee surrendered on the 9th day of April, 1865 ; Johnston, on the 26th day of the same month ; and that thus ceased all hostilities and opposition to the United States, in Virginia and North Carolina. How, in the face of such facts, can the Cotton Plant, *on the 10th of May following all this*, have been the subject of lawful capture as prize under *any* circumstances ?

But situated where she was, the steamer was not a subject for prize even if war had still been flagrant. The entire expedition by the picket launch was a *raid* rather than a lawful act of war. The act of July 2d, 1864, is conclusive ; declaring as it does, that no property taken, upon any of the '*inland waters*' of the United States by the naval forces shall be regarded as maritime prize, and provides, as it also | does, another p. 579
system for all such seizures. '*Inland*' means '*remote from the sea.*' In the case of *Mrs. Alexander's Cotton*,[1] the cotton was captured much as some of this was, on the Red River, a few miles above the point where it enters the Mississippi. This court declared that it could not be the subject of a libel as maritime prize, but should have been turned over to be treated as captured and abandoned property under the statutes of 1863 and 1864. It follows that the court below had no jurisdiction. The steamer and her cargo should have been '*promptly*' handed over to the agent of the Secretary of the Treasury. Want of jurisdiction in the court below, however, does not prevent this court from assuming jurisdiction on appeal for the purposes of reversing the decree rendered by the court below, and of vacating its unwarranted proceedings.[2]

Mr. C. H. Hill, Assistant Attorney-General, for the United States ; Mr. Ashton, for the captors, contra :

Although Generals Lee and Johnston had surrendered in April, 1865, General Richard Taylor did not surrender Mobile till May 4th, six days before this capture, and General Kirby Smith did not surrender until after it, May 23d. These are public historical facts, known to all and of which the court takes notice. War, therefore, still existed, and this capture, to use the words of Lord Tenterden, was 'a hostile seizure, made, if not *flagrante*, yet *nondum cessante bello*.'[3]

The Roanoke River, where the capture was made, was not 'inland waters' within the act of July 2d, 1864. It is a short navigable river, flowing directly into tidal waters. The term 'inland waters' has been

[1] 2 Wallace, 204.
[2] Morris's Cotton, 8 Id. 507.
[3] Elphinstone *v.* Bedreechund, 1 Knapp, 316.

generally considered as applying to the lakes or to the immense rivers like the Missouri, Mississippi, Ohio, &c., which have their courses a thousand miles from the sea. To come within the act all the waters should be 'inland.' But water which runs directly into the sea is not
p. 580 'inland,' though the term may | apply to such waters as flow into other waters that do discharge themselves into the sea.

This case is different from that of *Mrs. Alexander's Cotton*. That was cotton seized wholly on land and which grew on the plantation where it was deposited. No maritime capture was made with it, and there was nothing to distinguish it from any other property on land which is ordinarily exempt from condemnation as prize. The Red River, on whose banks that seizure was, enters the Mississippi at a distance of 334 miles from the sea.

Mr. Justice STRONG delivered the opinion of the court.

Whether the steamer Cotton Plant and her cargo of cotton were subject to lawful capture when seized, is a question that need not now be considered; for if it be conceded that they were, we are still of opinion that they were not liable to condemnation as maritime prize. The capture was made within the State of North Carolina, on the Roanoke River, and about one hundred and thirty miles above its mouth. It was made by a naval force detached from two steamers that had proceeded up the river from Albemarle Sound, one about eighty, and the other about one hundred miles, where they stopped, in consequence of the crookedness of the stream and apprehensions of low water. A picket launch, with a crew of six men, and two other boat's crews, were then sent forward, and they effected the capture. It was, therefore, an inland capture, though made upon a river which empties into an arm of the sea, and it was at a point where ordinary vessels of war could not safely go. There was nothing in the situation of the property that required peculiarly a naval force or maritime service to effect its capture. The seizure might as well have been made by a detachment from the army, as by one from the navy. It appears to us, therefore, that in view of the legislation of Congress, the property cannot be regarded as a maritime prize. By the
p. 581 seventh section of the act of July 2d, 1864,[1] | it was enacted 'that no property seized or taken upon any of the inland waters of the United States by the naval forces thereof, shall be regarded as maritime prize; but all property so seized or taken shall be promptly delivered to the proper officers of the courts (or) as provided in this act, and in the said act approved March twelve, eighteen hundred and sixty-three.' The language of this section is very comprehensive. It embraces *all property* seized or taken by the naval forces upon *any* of the inland waters of the United States. It would be difficult to give any reason for holding that the part

[1] 13 Stat. at Large, 377.

of the Roanoke River upon which the Cotton Plant was seized is not described by the phrase 'any of the inland waters of the United States,' as understood by Congress. The river is wholly inland. It is true that it discharges its waters into Albemarle Sound, and that it is accessible directly from the ocean. But, in speaking of inland waters, Congress must have intended waters, within land indeed, yet waters where a naval force can go, and where naval captures could be made. And it is obvious that other waters than those of the great lakes were contemplated and designed to be included. The act was passed during the war of the rebellion, and it was part of a system devised for securing captured and abandoned property in States and districts declared to be in insurrection by the President's proclamation of July 1st, 1862. There was no war upon the lakes, and they were not within insurrectionary districts. If, therefore, the act does not apply to rivers, and to rivers accessible from the sea, upon which naval captures could be made, it could never have had any practical effect. But if it applies to captures upon rivers, what reason can there be for confining its operation to seizures by the naval forces upon rivers that run directly into the sea? The act speaks of captures upon *any* of the inland waters of the United States. It makes no distinction between rivers that run directly into the sea, and those that flow into others that discharge into the sea. If any distinction exists it is purely arbitrary and judicial, rather than legislative. Both classes of rivers are inland waters; equally such. Maritime service | can be no p. 582
more meritorious or efficient upon one than upon the other. In the absence of express legislative enactment to that effect, no satisfactory reason can be given why a vessel captured on the Red River five miles above its junction with the Mississippi should be turned over to the courts to be treated as captured and abandoned property under the statutes of 1863 and 1864, which does not apply to a capture made on the Mississippi itself, five hundred miles farther from the Gulf of Mexico. Congress probably anticipated, especially in view of the state of the war when the act was passed, that most of the captures on the rivers would be made by the army, and thought it unwise to continue two modes for the disposition of the property taken.

Such being our opinion of the meaning of the seventh section of the act of July 2d, 1864, we must hold that the property captured and condemned in this case ought not to have been regarded as maritime prize, and subject to condemnation as such.

The decree of the District Court is therefore REVERSED, and the case is remanded, in accordance with the rule stated in *United States* v. *Weed*,[1] for further proceedings, if the government shall see fit to institute them.

[1] 5 Wallace, 62.

The Siren.

(13 Wallace, 389) 1871.

1. The right of vessels of the navy of the United States to prize-money comes only in virtue of grant or permission from the United States, and if no act of Congress sanctions a claim to it, it does not exist.
2. No such act gives prize to the navy in cases of joint capture by the army and navy.
3. In cases of such capture, the capture enures exclusively to the benefit of the United States.

APPEAL from the District Court for the District of Massachusetts; the case being thus:

Prior, and up to the morning of the 17th of February, 1865, a naval force of the United States, composed of the Gladiolus, and twenty-six other vessels of war, were blockading the port of Charleston and assisting to reduce the city; *a force operating also by land in the same general designs*. During the night of the 16th and 17th, the rebel forces evacuated the forts about the harbor, and abandoned the city. At 9 o'clock on the morning of the 17th, an officer of the land force raised the national flag upon Forts Sumter, Ripley, and Pinckney. At 10 a military officer reached Charleston; and the city surrendered itself, and the rebel stores, arms, and property there to him. Contemporaneously with these transactions the army approached the city, and the fleet moved towards
p. 390 its wharves. As the latter came near | to land, a boy on shore gave information that the Siren, a blockade-runner, a vessel of force inferior to the Gladiolus, had run in during the night, and was lying in Ashley River; which makes a west entrance inland from the bay where the blockading fleet was stationed. The Gladiolus, one of the leading vessels of the fleet, dispatched a boat's crew towards the vessel. When they got there they found that her crew, learning of the success of the Federal arms, and seeing the Gladiolus coming, had cut the injection-pipes of the vessel, set her on fire, and abandoned her. She was now in flames, filling with water, and surrounded by boats filled with negroes from the shore. The Gladiolus, herself, arrived at the scene soon after her boat's crew got there; and, with the people about, managed to put out the fire and tow the vessel to shallow water, where after great effort her leaks were stopped. She was then taken to Boston, and condemned as a prize of war, and sold; all questions as to the distribution of the proceeds being reserved. From the proceeds in the registry (less a certain sum, which on libel filed had been decreed to the owners of a vessel that the prize-crew of the Siren in bringing her into Boston for condemnation, had carelessly ran into and injured), the Gladiolus claimed both salvage and prize-money; claiming as the latter one-half of the proceeds. The other vessels named as part of the blockading force, set up a right to participate in the proceeds as captors with the Gladiolus.

The statute under which the claim of all the vessels was made[1] is in these words :

' The net proceeds of all property condemned as prize when the prize was of superior or equal force to the vessel or vessels making the capture, shall be decreed to the captors ; and when of inferior force to the vessel or vessels making the capture, one-half shall be decreed to the United States and the other half to the captors.'

There was no statute which provided for joint captures by the army and navy. |

The court below decreed in favor of the claim of the Gladiolus for p. 391
salvage, and gave the residue of the proceeds, after paying the sum decreed as damages for the collision, to the United States alone. From this decree, depriving them of all prize-money, the present appeal was taken by certain of the blockading vessels.

Messrs. Charles Cowley, and Charles Levi Woodbury, for the appellants ; Mr. C. H. Hill, Assistant Attorney-General, contra.

Mr. Justice SWAYNE delivered the opinion of the court.

In the English maritime jurisprudence the jurisdiction of the admiralty court on the instance side, and the jurisdiction in prize, are entirely distinct and independent of each other. When exercising one, it is called the instance court, and the prize court when exercising the other. The rules of procedure and adjudication in the latter are said to be no more like those which prevail in the former, than they are like those of any court in Westminster Hall. But from time immemorial both jurisdictions have been exercised by the same judge. As judge of the admiralty or instance court he is appointed by a commission under the great seal. This commission specifies fully and particularly the subjects of his jurisdiction, but is wholly silent as to prize. To give that jurisdiction, and bring it into activity, a commission under the great seal, in every war, was issued to the lord high admiral, to require the judge of admiralty to take cognizance of all captures, seizures, prizes, and reprisals of all ships and goods that should be taken, and to hear and determine according to the course of the admiralty and the law of nations. A special warrant was thereupon issued by the admiral. Since the reign of Elizabeth it does not appear that any special authority has been given to the judge. He has exercised exclusive jurisdiction in prize under his commission from the king, or under the power inherent in his office, or by virtue of both.[2] |

Prize was wholly the creature of the crown. No one could have any p. 392
interest but what he took as the gift of the king. Beyond this he could claim nothing. The reasons upon which the rule was founded were :

[1] Act of June 30th, 1864 ; 13 Stat. at Large, 306.
[2] Lindo *v.* Rodney, 2 Douglas, 613, note.

that right of making war and peace was exclusively in the sovereign; that the acquisitions of war must, therefore, belong to him, and that their disposal might be of the utmost importance for the purposes both of war and peace. It was held that it must be presumed from these considerations that the government did not intend to divest itself of this important attribute, except in so far as such a purpose was clearly and unequivocally expressed. The right is not the private property of the sovereign, but a trust confided to him for the public good. In private grants the construction is most strongly against the grantor. In all concessions touching capture the opposite rule prevails. A presumption arises against the grant, and it can only be rebutted by language so explicit as to leave no room for doubt upon the subject.[1]

The lord high admiral exists now only in contemplation of law. It was deemed expedient to assign to him a certain portion of the rights of the crown to maintain the dignity and splendor of his office.[2] Hence the doctrines of droits of the admiralty, and of captured property which belonged to the king, *virtute coronæ*. The lord high admiral is now represented by the king, who holds the office, but in a capacity distinct from his regal character, and the droits which belonged to the office, so far as they still subsist and are not otherwise disposed of, have in the progress of time become reattached to the crown.[3]

To the legal scholar the subject is full of the interest of antiquarian research, but its examination is not necessary to the decision of the present case. The proper limits of this opinion forbid us to pursue the inquiry further.

While the American colonies were a part of the British empire, the
p. 393 English maritime law, including the law of prize, | was the maritime law of this country. From the close of the Revolution down to this time it has continued to be our law, so far as it is adapted to the altered circumstances and condition of the country, and has not been modified by the proper national authorities.[4] In our jurisprudence there are, strictly speaking, no droits of admiralty. The United States have succeeded to the rights of the crown. No one can have any right or interest in any prize except by their grant or permission. All captures made without their express authority enure *ipso facto* to their benefit. Whenever a claim is set up its sanction by an act of Congress must be shown. If no such act can be produced the alleged right does not exist. The United States take captured property, not as droits, but strictly and solely *jure reipublicæ*.[5]

[1] The Elsebe, 5 Robinson, 155. [2] The Maria Francoise, 6 Id. 293.
[3] The Rebeckah, 1 Id. 227; The Mercurius, Ib. 81; The Joseph, 1 Gallison, 545; 3 Reeves's History of the English Law, 197.
[4] Thirty hogsheads of Sugar *v.* Boyle and others, 9 Cranch, 198.
[5] The Joseph, 1 Gallison, 555, 558; Dos Hermanos, 10 Wheaton, 310.

During the late civil war a land and naval force of the United States were beleaguring Charleston in South Carolina. The rebel fortifications and forces kept both at bay. This had been the condition of things for a considerable period. In the night of the 17th February, 1865, the insurgent troops evacuated the neighboring forts and abandoned the city. This became known the next morning. The fleet thereupon approached the city by water and the army by land. The Gladiolus, a steam propeller of the navy, was one of the leading vessels. When she was off the Battery at Charleston, a boy from the shore gave information that a blockade-runner was lying near by in Ashley River. A boat's crew from the Gladiolus was dispatched in quest of her. They found her on fire and surrounded by boats filled with colored people from the shore. The crew of the boat and others present proceeded to put out the fire. The Gladiolus reached the scene a few minutes after the arrival of the boat. The fire was extinguished ; the crew of the Gladiolus assisted in putting it out. It was found that the pipes of the vessel had been cut and that she was filling with water. The Gladiolus towed her to shallow water and her leaks were stopped. | She was the Siren, a side- p. 394
wheeled steamer of about one hundred and fifteen tons burden, and had run the blockade the night before. That morning her crew had cut her pipes, set her on fire, and abandoned her. She was sent to Boston for trial as prize of war. On her way she collided with another vessel. She was libelled by the United States in the District Court of Massachusetts. On the 7th of April, 1865, she was condemned as lawful prize and subsequently sold. All questions as to the distribution of the proceeds were left open by the decree for future adjudication. The owners of the vessel collided with, intervened and claimed damages. They were allowed by this court on appeal.[1] Salvage was claimed in behalf of the Gladiolus. One-half of the proceeds of the sale was also claimed for that vessel as prize money. The other appellant vessels of war claimed to participate with her. A decree of distribution was made on the 3d of July, 1869. The court allowed the claim for salvage, and ordered that the residue of the fund, less the sums decreed for damages arising from the collision, should be paid over to the United States. The appellants have brought this decree before us for review.

Four acts of Congress have been passed allowing captors to participate in the fruits of the property captured. They are the act of 1799,[2] that of 1800 ;[3] that of 1862,[4] and that of 1864.[5] It is necessary in this case to consider only one clause of the 10th section of the act last mentioned, which is as follows : ' The net proceeds of all property condemned as prize, when the prize was of superior or equal force to the vessel or vessels

[1] The Siren, 7 Wallace, 152.
[2] 1 Stat. at Large, 715.
[3] 2 Id. 52.
[4] 12 Id. 606.
[5] 13 Id. 306.

making the capture, shall be decreed to the captors. And when of inferior force, one-half shall be decreed to the United States and the other half to the captors.'

No provision is found in any of these statutes touching joint captures
p. 395 by the army and navy. They are wholly | silent as to the military arm of the service. It results from this state of things, according to the principles we have laid down, that such captures enure exclusively to the benefit of the United States. In the English law they are held not to be within the prize acts, and are provided for by statutes passed specially for that purpose. In the Genoa and its dependencies,[1] Lord Stowell, speaking of the word 'prize,' says: 'It evidently means maritime capture effected by maritime force only,—ships and cargoes taken by ships.' . . . 'What was taken by a conjunct expedition was formerly erroneously considered as vested in a certain proportion of it, in the capturing ships under the prize acts; but in a great and important case lately decided,[2] it was determined that the whole was entirely out of the effect of those prize acts, and in so deciding, determined by direct and included consequence, that the words "prizes taken by any of her Majesty's ships or vessels of war," cannot apply to any other cases than those in which captures are made by ships only.'

In *Booty in the Peninsula*,[3] the same great authority, referring to 'a conjunct expedition,' held this language: 'It may be difficult, and perhaps perilous, to define it negatively and exclusively. It is more easy and safe to define it affirmatively, that that is a conjunct expedition which is directed by competent authority, combining together the actions of two different species of force, for the attainment of some common specific purpose.'

The opinion of the court below proceeded upon the ground that the present case is one of this character. Whether it was or was not is the question presented for our determination. The application of Lord Stowell's test leaves no room for doubt as to its proper solution.

We have already adverted to the ingress of the navy into the harbor of Charleston on the morning of the 17th of February. At nine o'clock that morning an officer of the land forces hoisted the national flag over
p. 396 the ruins of Fort Sumter. Flags were also raised over Forts Ripley and Pinckney. At ten o'clock a military officer reached Charleston. The mayor surrendered the city to him. Four hundred and fifty pieces of artillery, military stores, and much other property were captured with it. Contemporaneously with these things was the seizure of the Siren by the Gladiolus, and the approach and arrival of the rest of the fleet.

[1] 2 Dodson, 446.
[2] Hoagskarpel, Lords of Appeal, 1785.
[3] 1 Haggard, 47.

The two forces were acting under the orders of a common government, for a common object, and for none other. They were united in their labors and their perils, and in their triumph they were not divided. They were converging streams toiling against the same dike. When it gave way both swept in without any further obstruction. The consummation of their work was the fall of the city. Either force, after the abandonment of their defences by the rebels, could have seized all that was taken by both. The meritorious service of the Gladiolus was as a salvor, and not as a captor. Precedence in the time of the arrival of the respective forces is an element of no consequence. Upon principle, reason, and authority we think the judgment of the District Court was correctly given. The decree of condemnation committed the court to nothing as to the distribution. The course pursued was eminently proper under the circumstances, and according to the course of practice in proceedings in prize.[1] The allowance of salvage by the court below was not objected to in the argument here.

It has been suggested that the capture was within the 7th section of the act of the 2d of July, 1864,[2] which declares that 'no property seized or taken upon any of the inland waters of the United States by the naval forces thereof shall be regarded as maritime prize,' &c. The aspect in which the case has been examined, and the conclusions reached, render it unnecessary to consider that proposition, and we express no opinion upon the subject.

DECREE AFFIRMED.

The Nuestra Señora de Regla.

(17 Wallace, 29) 1872.

1. In prize cases, wherever it appears that notice of appeal or of intention to appeal to this court was filed with the clerk of the District Court within thirty days next after the final decree therein, an appeal will be allowed to this court whenever the purposes of justice require it.
2. Counsel fees before a commissioner on the settlement of damages on an award of restitution, disallowed as excessive and unwarranted.
3. A Spanish-owned vessel on her way from New York to Havana put in distress, by leave of the admiral commanding the squadron, into Port Royal, S. C., then in rebellion, and blockaded by a government fleet, and was there seized as prize of war and used by the government. . . . She was afterwards condemned as prize, but ordered to be restored. She never was restored. Damages for her seizure, detention, and value being | awarded. *Held*, that clearly she was not p. 30
lawful prize of war or subject of capture; and that her owners were entitled to fair indemnity, though it might be well doubted whether the case was not more properly a subject for diplomatic adjustment than for determination by the courts.

APPEAL from the District Court for the Southern District of New York.

[1] The Maria Francoise, 6 Robinson, 292.

[2] 13 Stat. at Large, 377.

The steamer Nuestra Señora de Regla, then recently built in New York for a Spanish corporation doing business in Cuba, and owned by it, was on her way, November, 1861, to Havana. On her voyage thither, being in distress and want of coal, she put into Port Royal, near Charleston, S. C. (then in rebellion against the United States, and blockaded by a government squadron), under permission of the admiral in command. She was here seized November 29th, 1861, as prize of war, and used by the government till June, 1862, when she was brought to New York and condemned in prize. On the 20th of June, however, in the following year (the United States in the meantime using the vessel), a decree of restitution was ordered. The vessel, however, never was restored. The case being referred to a commissioner to ascertain the damages for the seizure and detention, he made a report on the 10th of May, 1871, in which he awarded—

For the use of the vessel from November 29th, 1861, up to and including June 20th, 1863, being 568 days, with interest at the rate of six per cent. per annum to the date of his report, . . .	$167,370 66⅔
For expenses and services of claimant's agent in remaining with and attending to said vessel, . .	5,680 00
For counsel fees in defending the proceedings, . .	5,000 00
For the value of the vessel when she shall have been restored, at the rate of six per cent., with interest,	36,833 33⅓
Total, ...	$214,884 00

Several exceptions (not necessary to be specified, as they were not passed on by this court) were taken to this report by the government, but on the 28th of October, 1871, the exceptions were overruled and the report confirmed, and final judgment rendered against the libellants and
p. 31 captors for said sum, together with $6086.84, interest thereon from | the date of the report to the date of this decree, the sum as finally decreed amounting, in all, to $220,970.84.

On the 7th of November, 1871, the United States filed with the clerk of the District Court at New York, notice that the libellant 'appeals to the Supreme Court of the United States from the decree made in the said action on the 28th of October, 1871,' and the case was now here, and a notice of the appeal served by copy on the proctor for the claimants, on the 17th of the same month. On the 17th of February, 1872, the appeal was allowed by Mr. Justice Swayne, of the Supreme Court, at Washington, and the claimants cited to appear before said court on the 21st of March, 1872.

The questions were argued in this court :

1st. Whether the court had jurisdiction ?

2d. If it had, how the case stood on merits ?

Mr. G. H. Williams, Attorney-General, and Mr. C. H. Hill, Assistant Attorney-General, for the appellants; Mr. W. M. Evarts and C. Donohue, contra.

The CHIEF JUSTICE delivered the opinion of the court.

In prize cases, wherever it appears that notice of appeal, or of intention to appeal, to this court was filed with the clerk of the District Court within thirty days next after the final decree therein, an appeal will be allowed to this court whenever the purposes of justice require it. An appeal is accordingly allowed in this case, under the second section of the act of March 3d, 1873, making appropriations for the naval service, and for other purposes.

The decree of the District Court included the sum of $5000, for counsel fees. We think that the amount was greatly excessive, and the allowance of counsel fees wholly unwarranted.

It is clear that the vessel was not lawful prize of war or subject of capture, and the corporation which owned her is doubtless entitled to fair indemnity for the losses sustained by the seizure and employment of the vessel; but it may be | well doubted whether it is not more properly a p. 32
subject of diplomatic adjustment than of determination by the courts.

For the errors in the decree already indicated, it is REVERSED, and the cause is

REMANDED FOR FURTHER PROCEEDINGS.

United States v. Diekelman.

(92 U.S. Reports, 520) 1875.

1. Unless treaty stipulations provide otherwise, a merchant vessel of one country visiting the ports of another for the purpose of trade, is, so long as she remains, subject to the laws which govern them.
2. Where, in time of war, a foreign vessel, availing herself of a proclamation of the President of May 12, 1862, entered the port of New Orleans, the blockade of which was not removed, but only relaxed in the interests of commerce, she thereby assented to the conditions imposed by such proclamation that she should not take out goods contraband of war, nor depart until cleared by the collector of customs according to law.
3. As New Orleans was then governed by martial law, a subject of a foreign power entering that port with his vessel under the special license of the proclamation became entitled to the same rights and privileges accorded under the same circumstances to loyal citizens of the United States. Restrictions placed upon them operated equally upon him.
4. Money, silver-plate, and bullion, when destined for hostile use or for the purchase of hostile supplies, are contraband of war. In this case, the determination of the question whether such articles, part of the outward-bound cargo of the vessel, were contraband, devolved upon the commanding general at New Orleans. Believing them to be so, he, in discharge of his duty, ordered them to be removed from her, and her clearance to be withheld until his order should be complied with.
5. Where the detention of the vessel in port was caused by her resistance to the

orders of the properly constituted authorities whom she was bound to obey, she preferring such detention to a clearance upon the conditions imposed,— *Held*, that her owner, a subject of Prussia, is not 'entitled to any damages' against the United States, under the law of nations or the treaty with that power. 8 Stat. 384.

APPEAL from the Court of Claims.

Mr. Assistant Attorney-General Edwin B. Smith for the appellant.

Mr. J. D. McPherson, contra.

MR. CHIEF JUSTICE WAITE delivered the opinion of the court.

p. 521 This suit was brought in the Court of Claims under the authority | of a joint resolution of both Houses of Congress, passed May 4, 1870, as follows :—

'That the claim of E. Diekelman, a subject of the King of Prussia, for damages for an alleged detention of the Ship "Essex" by the military authorities of the United States at New Orleans, in the month of September, 1862, be and is hereby referred to the Court of Claims for its decision in accordance with law, and to award such damages as may be just in the premises, if he may be found to be entitled to any damages.'

Before this resolution was passed, the matter of the claim had been the subject of diplomatic correspondence between the governments of the United States and Prussia.

The following article, originally adopted in the treaty of peace between the United States and Prussia, concluded July 11, 1799 (8 Stat. 168), and revived by the treaty concluded May 1, 1828 (8 Stat. 384), was in force when the acts complained of occurred, to wit :—

'Art. XIII. And in the same case, if one of the contracting parties, being engaged in war with any other power, to prevent all the difficulties and misunderstandings that usually arise respecting merchandise of contraband, such as arms, ammunition, and military stores of every kind, no such articles carried in the vessels, or by the subjects or citizens of either party, to the enemies of the other, shall be deemed contraband so as to induce confiscation or condemnation, and a loss of property to individuals. Nevertheless, it shall be lawful to stop such vessels and articles, and to detain them for such length of time as the captors may think necessary to prevent the inconvenience or damage that might ensue from their proceeding; paying, however, a reasonable compensation for the loss such arrest shall occasion to the proprietors; and it shall further be allowed to use in the service of the captors the whole or any part of the military stores so detained, paying the owners the full value of the same, to be ascertained by the current price at the place of its destination. But in the case supposed of a vessel stopped for articles of contraband, if the master of the vessel stopped will deliver out the goods supposed to be of contraband nature, he shall be admitted to do it, and the vessel shall not, in that case, be carried into any port, nor further detained, but shall be allowed to proceed on her voyage.' |

p. 522 When the 'Essex' visited New Orleans, the United States were engaged in the war of the rebellion. The port of that city was, at the

very commencement of the war, placed under blockade, and closed against trade and commercial intercourse; but, on the 12th of May, 1862, the President, having become satisfied that the blockade might 'be safely relaxed with advantage to the interests of commerce,' issued a proclamation, to the effect that from and after June 1 'commercial intercourse, . . . except as to persons, things, and information contraband of war,' might 'be carried on subject to the laws of the United States, and to the limitations, and in pursuance of the regulations . . . prescribed by the Secretary of the Treasury,' and appended to the proclamation. These regulations, so far as they are applicable to the present case, are as follows:—

'1. To vessels clearing from foreign ports and destined to . . . New Orleans, . . . licenses will be granted by consuls of the United States upon satisfactory evidence that the vessels so licensed will convey no persons, property, or information contraband of war either to or from the said ports; which licenses shall be exhibited to the collector of the port to which said vessels may be respectively bound, immediately on arrival, and, if required, to any officer in charge of the blockade; and on leaving either of said ports every vessel will be required to have a clearance from the collector of the customs according to law, showing no violation of the conditions of the license.' 12 Stat. 1264.

The 'Essex' sailed from Liverpool for New Orleans June 19, 1862, and arrived Aug. 24. New Orleans was then in possession of the military forces of the United States, with General Butler in command. The city was practically in a state of siege by land, but open by sea, and was under martial law.

The commanding general was expressly enjoined by the government of the United States to take measures that no supplies went out of the port which could afford aid to the rebellion; and, pursuant to this injunction, he issued orders in respect to the exportation of money, goods, or property, on account of any person known to be friendly to the Confederacy, and directed the custom-house officers to inform him whenever an attempt was made to send anything out which might be the subject of investigation in that behalf. |

In the early part of September, 1862, General Butler, being still in p. 523
command, was informed that a large quantity of clothing had been bought in Belgium on account of the Confederate government, and was lying at Matamoras awaiting delivery, because that government had failed to get the means they expected from New Orleans to pay for it; and that another shipment, amounting to a half million more, was delayed in Belgium from coming forward, because of the non-payment of the first shipment. He was also informed that it was expected the first payment would go forward through the agency of some foreign consuls; and this information afterwards proved to be correct.

He was also informed early in September by the custom-house officers,

that large quantities of silver-plate and bullion were being shipped on the 'Essex,' then loading for a foreign port, by persons, one of whom had declared himself an enemy of the United States, and none of whom would enroll themselves as friends; and he thereupon gave directions that the specified articles should be detained, and their exportation not allowed until further orders.

On the 15th September, the loading of the vessel having been completed, the master applied to the collector of the port for his clearance, which was refused in consequence of the orders of General Butler, but without any reason being assigned by the collector. The next day, he was informed, however, that his ship would not be cleared unless certain specified articles which she had on board were taken out and landed. Much correspondence ensued between General Butler and the Prussian consul at New Orleans in reference to the clearance, in which it was distinctly stated by General Butler that the clearance would not be granted until the specified goods were landed, and that it would be granted as soon as this should be done. Almost daily interviews took place between the master of the vessel and the collector, in which the same statements were made by the collector. The master refused to land the cargo, except upon the return of his bills of lading. Some of these bills were returned, and the property surrendered to the shipper. In another case, the shipper gave an order upon the master for his goods, and they were taken away by force. At a very early stage in the proceeding, the
p. 524 master and the Prussian consul | were informed that the objection to the shipment of the articles complained of was that they were contraband.

A part only of the goods having been taken out of the vessel, a clearance was granted her on the 6th of October, and she was permitted to leave the port and commence her voyage.

Upon this state of facts, the Court of Claims gave judgment for Diekelman, from which the United States took an appeal.

One nation treats with the citizens of another only through their government. A sovereign cannot be sued in his own courts without his consent. His own dignity, as well as the dignity of the nation he represents, prevents his appearance to answer a suit against him in the courts of another sovereignty, except in performance of his obligations, by treaty or otherwise, voluntarily assumed. Hence, a citizen of one nation wronged by the conduct of another nation, must seek redress through his own government. His sovereign must assume the responsibility of presenting his claim, or it need not be considered. If this responsibility is assumed, the claim may be prosecuted as one nation proceeds against another, not by suit in the courts, as of right, but by diplomacy, or, if need be, by war. It rests with the sovereign against whom the demand is made to determine for himself what he will do in respect to it. He

may pay or reject it ; he may submit to arbitration, open his own courts to suit, or consent to be tried in the courts of another nation. All depends upon himself.

In this case, Diekelman, claiming to have been injured by the alleged wrongful conduct of the military forces of the United States, made his claim known to his government. It was taken into consideration, and became the subject of diplomatic correspondence between the two nations. Subsequently, Congress, by joint resolution, referred the matter to the Court of Claims ' for its decision according to law.' The courts of the United States were thus opened to Diekelman for this proceeding. In this way the United States have submitted to the Court of Claims, and through that court upon appeal to us, the determination of the question of their legal liability under all the circumstances of this case for the payment of damages to a citizen of Prussia upon a claim originally presented by his sovereign in his behalf. This requires us, we think, to consider | the rights of the claimant under the treaty between the two p. 525
governments, as well as under the general law of nations. For all the purposes of its decision, the case is to be treated as one in which the government of Prussia is seeking to enforce the rights of one of its citizens against the United States in a suit at law, which the two governments have agreed might be instituted for that purpose. We shall proceed upon that hypothesis.

1. As to the general law of nations.

The merchant vessels of one country visiting the ports of another for the purposes of trade subject themselves to the laws which govern the port they visit, so long as they remain ; and this as well in war as in peace, unless it is otherwise provided by treaty. *The Exchange* v. *McFadon*, 7 Cranch, 316. When the ' Essex ' sailed from Liverpool, the United States were engaged in war. The proclamation under which she was permitted to visit New Orleans made it a condition of her entry that she should not take out goods contraband of war, and that she should not leave until cleared by the collector of customs according to law. Previous to June 1 she was excluded altogether from the port by the blockade. At that date the blockade was not removed, but relaxed only in the interests of commerce. The war still remained paramount, and commercial intercourse subordinate only. When the ' Essex ' availed herself of the proclamation and entered the port, she assented to the conditions imposed, and cannot complain if she was detained on account of the necessity of enforcing her obligations thus assumed.

The law by which the city and port were governed was martial law. This ought to have been expected by Diekelman when he despatched his vessel from Liverpool. The place had been wrested from the possession of the enemy only a few days before the issue of the proclamation, after

a long and desperate struggle. It was, in fact, a garrisoned city, held as an outpost of the Union army, and closely besieged by land. So long as it remained in the possession of the insurgents, it was to them an important blockade-running point, and after its capture the inhabitants were largely in sympathy with the rebellion. The situation was, therefore,
p. 526 one requiring the most active vigilance | on the part of the general in command. He was especially required to see that the relaxation of the blockade was not taken advantage of by the hostile inhabitants to promote the interests of the enemy. All this was matter of public notoriety ; and Diekelman ought to have known, if he did not in fact know, that although the United States had to some extent opened the port in the interests of commerce, they kept it closed to the extent that was necessary for the vigorous prosecution of the war. When he entered the port, therefore, with his vessel, under the special license of the proclamation, he became entitled to all the rights and privileges that would have been accorded to a loyal citizen of the United States under the same circumstances, but no more. Such restrictions as were placed upon citizens, operated equally upon him. Citizens were governed by martial law. It was his duty to submit to the same authority.

Martial law is the law of military necessity in the actual presence of war. It is administered by the general of the army, and is in fact his will. Of necessity it is arbitrary ; but it must be obeyed. New Orleans was at this time the theatre of the most active and important military operations. The civil authority was overthrown. General Butler, in command, was the military ruler. His will was law, and necessarily so. His first great duty was to maintain on land the blockade which had theretofore been kept up at sea. The partial opening of the port toward the sea, made it all the more important that he should bind close the military lines on the shore which he held.

To this law and this government the ' Essex ' subjected herself when she came into port. She went there for gain, and voluntarily assumed all the chances of the war into whose presence she came. By availing herself of the privileges granted by the proclamation, she, in effect, covenanted not to take out of the port ' persons, things, or information contraband of war.' What is contraband depends upon circumstances. Money and bullion do not necessarily partake of that character ; but, when destined for hostile use or to procure hostile supplies, they do. Whether they are so or not, under the circumstances of a particular case,
p. 527 must be determined by some | one when a necessity for action occurs. At New Orleans, when this transaction took place, this duty fell upon the general in command. Military commanders must act to a great extent upon appearances. As a rule, they have but little time to take and consider testimony before deciding. Vigilance is the law of their duty. The

success of their operations depends to a great extent upon their watchfulness.

General Butler found on board this vessel articles which he had reasonable cause to believe, and did believe, were contraband, because intended for use to promote the rebellion. It was his duty, therefore, under his express instructions, to see that the vessel was not cleared with these articles on board ; and he gave orders accordingly. It matters not now whether the property suspected was in fact contraband or not. It is sufficient for us that he had reason to believe, and in fact did believe, it to be contraband. No attempt has been made to show that he was not acting in good faith. On the contrary, it is apparent, from the finding of the court below, that the existing facts brought to his knowledge were such as to require his prompt and vigorous action in the presence of the imminent danger with which he was surrounded. Certainly enough is shown to make it necessary for this plaintiff to prove the innocent character of the property before he can call upon the United States to respond to him in damages for the conduct of their military commander, upon whose vigilance they relied for safety.

Believing, then, as General Butler did, that the property was contraband, it was his duty to order it out of the ship, and to withhold her clearance until his order was complied with. He was under no obligation to return the bills of lading. The vessel was bound not to take out any contraband cargo. She took all the risks of this obligation when she assumed it, and should have protected herself in her contracts with shippers against the contingency of being required to unload after the goods were on board. If she failed in this, the consequences are upon her, and not the United States. She was operating in the face of war, the chances of which might involve her and her cargo in new complications. She voluntarily assumed the risks of her hazardous enterprise, and must sustain the losses that follow. |

Neither does it affect the case adversely to the United States that the p. 528
property had gone on board without objection from the custom-house officers or the military authorities. It is not shown that its character was known to General Butler or the officers of the custom-house before it was loaded. The engagement of the vessel was not to leave until she had been cleared according to law, and that her clearance might be withheld until with reasonable diligence it could be ascertained that she had no contraband property on board. This is the legitimate effect of the provisions of the treasury regulations, entitling her to a license ' upon satisfactory evidence ' that she would ' convey no persons, property, or information contraband of war, either to or from ' the port ; and requiring her not to leave until she had ' a clearance from the collector of customs, according to law, showing no violation of the license.' Her

entry into the port was granted as a favor, not as a right, except upon the condition of assent to the terms imposed. If the collector of customs was to certify that the license she held had not been violated, it was his duty to inquire as to the facts before he made the certificate. Every opportunity for the prosecution of this inquiry must be given. Under the circumstances, the closest scrutiny was necessary. If, upon the examination preliminary to the clearance, prohibited articles were found on board, there could be no certificate such as was required, until their removal. It would then be for the vessel to determine whether she would remove the goods and take the clearance, or hold the goods and wait for some relaxation of the rules which detained her in port as long as she had them on board. General Butler only insisted upon her remaining until she removed the property. She elected to remain. There was no time when her clearance would not have been granted if the suspected articles were unloaded.

We are clearly of the opinion that there is no liability to this plaintiff resting upon the United States under the general law of nations.

2. As to the treaty.

The vessel was in port when the detention occurred. She had not broken ground, and had not commenced her voyage. She came into the
p. 529 waters of the United States while an impending | war was flagrant, under an agreement not to depart with contraband goods on board. The question is not whether she could have been stopped and detained after her voyage had actually commenced, without compensation for the loss, but whether she could be kept from entering upon the voyage and detained by the United States within their own waters, held by force against a powerful rebellion, until she had complied with regulations adopted as a means of safety, and to the enforcement of which she had assented, in order to get there. In our opinion, no provision of the treaties in force between the two governments interferes with the right of the United States, under the general law of nations, to withhold a custom-house clearance as a means of enforcing port regulations.

Art. XIII of the treaty of 1828 contemplates the establishment of blockades, and makes special provision for the government of the respective parties in case they exist. The vessels of one nation are bound to respect the blockades of the other. "Clearly the United States had the right to exclude Prussian vessels, in common with those of all other nations, from their ports altogether, by establishing and maintaining a blockade while subduing a domestic insurrection. The right to exclude altogether necessarily carries with it the right of admitting through an existing blockade upon conditions, and of enforcing in an appropriate manner the performance of the conditions after admission has been obtained. It will not be contended that a condition which prohibits the taking out

of contraband goods is unreasonable, or that its performance may not be enforced by refusing a clearance until it has been complied with. Neither, in the absence of treaty stipulations to the contrary, can it be considered unreasonable to require goods to be unloaded, if their contraband character is discovered after they have gone on board. In the existing treaties between the two governments there is no such stipulation to the contrary. In the treaty of 1799, Art. VI is as follows: 'That the vessels of either party, loading within the ports of jurisdiction of the other, may not be uselessly harassed or detained, it is agreed that all examinations of goods required by the laws shall be made before they are laden on board the vessel, and that there shall be no examination after.' While other articles in the | treaty of 1799 were revived and kept in force by p. 530
that of 1828, this was not. The conclusion is irresistible, that the high contracting parties were unwilling to continue bound by such a stipulation, and, therefore, omitted it from their new arrangement. It would seem to follow, that, under the existing treaty, the power of search and detention for improper practices continued, in time of peace even, until the clearance had been actually perfected and the vessel had entered on her voyage. If this be the rule in peace, how much more important is it in war for the prevention of the use of friendly vessels to aid the enemy.

Art. XIII of the treaty of 1799, revived by that of 1828, evidently has reference to captures and detentions after a voyage has commenced, and not to detentions in port, to enforce port regulations. The vessel must be 'stopped' in her voyage, not detained in port alone. There must be 'captors;' and the vessel must be in a condition to be 'carried into port' or detained from 'proceeding' after she has been 'stopped,' before this article can become operative. Under its provisions the vessel 'stopped' might 'deliver out the goods supposed to be contraband of war,' and avoid further 'detention.' In this case there was no detention upon a voyage, but a refusal to grant a clearance from the port that the voyage might be commenced. The vessel was required to 'deliver out the goods supposed to be contraband' before she could move out of the port. Her detention was not under the authority of the treaty, but in consequence of her resistance of the orders of the properly constituted port authorities, whom she was bound to obey. She preferred detention in port to a clearance on the conditions imposed. Clearly her case is not within the treaty. The United States, in detaining, used the right they had under the law of nations and their contract with the vessel, not one which, to use the language of the majority of the Court of Claims, they held under the treaty 'by purchase' at a stipulated price.

As we view the case, the claimant is not 'entitled to any damages'

as against the United States, either under the treaty with Prussia or by the general law of nations.

The judgment of the Court of Claims is, therefore, reversed, and the cause remanded with directions to dismiss the petition.

United States v. Ames.

(99 U.S. Reports, 35) 1878.

1. A bond accepted by the court upon ordering the delivery to the claimant of property seized in admiralty, is in the subsequent proceedings a substitute for the property; and the question whether a case is made for the recall of the property must be determined before a final decree on the bond is rendered in the District Court, or in the Circuit Court on appeal. Action on that question cannot be reviewed here.
2. A decree rendered on such a bond given with sureties by the claimant at the request and for the benefit of his firm, to which the property so delivered to him belonged, bars a suit against the other partners.
3. The fact that the adverse party had no knowledge touching the ownership of the property, and that, by reason of the insolvency of the defendants, payment of the decree cannot be enforced, affords, in the absence of fraud, misrepresentation, or mistake, no ground for relief in equity.
4. Conclusions of law are not admitted by a demurrer.

APPEAL from the Circuit Court of the United States for the District of Massachusetts.

The facts are stated in the opinion of the court.

Mr. E. S. Mansfield and *Mr. G. A. Somerby* for the appellant.

Mr. George O. Shattuck and *Mr. Oliver W. Holmes, Jr., contra.*

MR. JUSTICE CLIFFORD delivered the opinion of the court.

Judicial cognizance of prize cases is derived from that article of the Constitution which ordains that the judicial power shall extend to all cases of admiralty and maritime jurisdiction; and the district courts for many years exercised jurisdiction in such cases without any other authority from Congress than what was conferred by the ninth section of the Judiciary Act, which gave those courts exclusive original cognizance of all civil causes of admiralty and maritime jurisdiction, including the seizures therein mentioned, the rule adopted being that prize jurisdiction was involved in the general delegation of admiralty and maritime cognizance, as conferred by the language of that section. *Glass* v. *The Betsey*, 3 Dall. 6; *The Admiral*, 3 Wall. 603; *Jennings* v. *Carson*, 1 Pet. Adm. 7; 1 Kent, Com. (12th ed.) 355; 2 Stat. 781, sect. 6.

p. 36 Admiralty courts proceed according to the principles, rules, | and usages which belong to the admiralty as contradistinguished from the courts of common law. *Manro* v. *Almeida*, 10 Wheat. 473; 1 Stat. 276.

Seizure of the property and the usual notice precede the appearance of the claimant; but when those steps are taken, the owner or his agent,

if he desires to defend the suit, must enter his appearance in the case, and the court may, in its discretion, require the party proposing to appear and defend the suit to give security for costs as a preliminary condition to the granting of such leave.

Due appearance having been entered, the claimant, if he wishes to avoid the inconvenience and expense of having the property detained until the termination of the suit, may apply to the court at any time to have the property released on giving bond, which application it is competent for the court to grant or refuse.

Bail in such a case is a pledge or substitute for the property as regards all claims that may be made against it by the promoter of the suit. It is to be considered as a security, not for the amount of the claim, but simply for the value of the property arrested, to the extent of the claim and costs of suit, if any, beyond the preliminary stipulation. Williams & Bruce, Prac. 210.

Whenever a stipulation is taken in the admiralty for the property subjected to legal process and condemnation, the stipulation is deemed a mere substitute for the thing itself, and the stipulators are held liable to the exercise of all those authorities on the part of the court which the tribunal could properly exercise if the thing itself were still in the custody of the court. *The Palmyra*, 12 Wheat. 1; *The Wanata*, 95 U.S. 611; *The Steamer Webb*, 14 Wall. 406.

Fees and expenses of keeping the property having been paid, it is the duty of the marshal to surrender the property as directed in the order of release; and it is settled law that if any one in defiance of the order, unlawfully detains the same he is liable to be proceeded against by attachment. *The Towan*, 8 Jurist, 223; *The Tritonia*, 5 Notes of Cases, 111.

Concisely stated, the material facts as derived from the | allegations p. 37
of the bill of complaint are as follows: 1. That a certain steamboat was with her cargo, consisting of eleven hundred and twenty bales of cotton, seized as enemy property. 2. That proceedings, on the 23d of March, 1865, were commenced against the property in the District Court for the Eastern District of Louisiana, to procure a decree of forfeiture of the property, the charge being that the cargo was obtained within territory occupied by armed public enemies. 3. That the person named in the bill of complaint appeared in the suit as claimant of the cargo, and obtained an order of the court that the cargo of cotton might be released to the claimant, he, the claimant, giving bond to the complainants in the sum of $350,000, with good and solvent security. 4. That the claimant on the following day, in pursuance of the order, filed the required bond to the amount specified in open court, duly executed by the claimant as principal and with sureties accepted by the court as satis-

factory. 5. That the marshal on the same day, in compliance with the order of the court, released and delivered the cargo to the claimant. 6. That on the 10th of May following the District Court entered a decree in the suit dismissing the libel and ordered that the cargo seized be restored to the claimant, from which decree the complainants appealed to the Circuit Court. 7. That the Circuit Court on the 8th of June then next reversed the decree of the District Court and entered a decree condemning the steamboat and her cargo as forfeited to the United States, and condemning the claimant to pay to the complainants $204,982.28, with interest, and a decree in the usual form against the sureties. 8. That the decree last named is in full force, and that neither the claimant nor sureties have ever paid the same or any part thereof to the complainants. 9. *Nulla bona* having been returned upon the execution, the present bill of complaint was filed in the name of the United States; and the prayer is that the executors of Oakes Ames may be decreed to admit assets in their hands sufficient to pay and satisfy the aforesaid decree and interest, and that it be decreed that they shall pay the amount of the decree and interest to the complainants.

p. 38 Certain other matters are also set forth in the bill of complaint | which it is alleged entitle the complainants to the relief prayed, of which the following are the most material: 1. That at the time of the seizure of the steamboat and her cargo, and at the time the bond for the release of the cargo was given, and at the time the decree was entered against the claimant and his sureties in the bond, the testator of the executors named as respondents and the other respondent named were partners of the claimant under the firm and style alleged in the bill of complaint, and that the partners in the course of the partnership business purchased the cargo of the steamboat for the benefit of the partnership, and that the other two partners well knew of the commencement of the suit by the complainants to procure a decree of forfeiture of the property, and that they directed the claimant to give the release bond in the name and style of the partnership as obligors, and that the copartners obtained possession of the cargo and sold the same, and received the proceeds to their own use as copartners. 2. That large sums of money, to wit, $21,963.72, paid for storage, internal revenue, and the charges of the treasury agent, were paid with the funds of the partnership with full knowledge of all the said copartners, as well as counsel fees and the expenses of defending the suit to condemn the property. 3. That the complainants at the time the release bond was executed had no knowledge that these parties were partners, and that neither the partnership nor the partner last named in the bill of complaint have sufficient goods or estate to pay the amount of the decree against the claimant and his sureties.

Service was made, and the respondent executors appeared and demurred to the bill of complaint, and on the same day the other respondent appeared, and he also filed a demurrer to the bill. Continuance followed, and at the next session of the court in the same term the Circuit Court entered a decree sustaining the demurrers and dismissing the bill of complaint. Prompt appeal was taken by the complainants in open court, and they now assign for error that the Circuit Court erred in sustaining the demurrers and in dismissing the bill of complaint.

Equitable relief is claimed by the complainants chiefly upon three grounds, each of which is attempted to be supported upon the theory that they have suffered a loss and that they have | not an adequate and p. 39
complete remedy at law. Irrespective of the course pursued by counsel in the argument of the cause, the respective grounds of claim will be examined by the court in the following order, as the one best calculated to exhibit the controversy in its true light.

Throughout it may be considered that the complainants admit that they have no remedy at law, but they contend that they are entitled to equitable relief for at least three reasons: 1. Because the property seized as forfeited to the United States has been legally condemned, and that the principal and sureties in the stipulation for value given for the release of the same at the commencement of the proceedings in the admiralty court have become insolvent and unable to pay the amount of the decree recovered by the complainants in the admiralty court. 2. Because the other two partners named in the bill of complaint were each equally interested with the claimant in the property seized and condemned, of which the complainants had no knowledge; and that inasmuch as the property when released went into the possession of the partnership and was sold for the benefit of all the partners, the claim of the complainants is that they are entitled to equitable relief. 3. Because the estate of the deceased partner is liable for the whole decree; and inasmuch as his estate is insufficient to pay all his debts, the United States are entitled to maintain the bill of complaint to secure their preference.

Due seizure of the property was made and due proceedings were instituted in the Admiralty Court for its condemnation; and the allegations of the bill of complaint show that the person named was duly admitted to appear as claimant, and that the Admiralty Court on his motion passed the order that the property should be released upon his giving a bond to the complainants in the sum of $350,000, with good and solvent security, which is the usual order given in such cases.

Proceedings of the kind are usually adopted in all seizures under the revenue and navigation laws, as is well known to every practitioner in such cases. 1 Stat. 696, sect. 89; Rev. Stat. 938. Bond or stipulation

with sureties for the discharge of the property seized is allowed in all revenue cases, except for forfeiture, and the better opinion is that even
p. 40 in seizures | for forfeiture the bond may be executed in the same manner by the claimant. Id., sects. 940, 941.

Pursuant to the known and well-recognized practice, the court allowed the claimant to give the bond with sureties approved by the court, and thereupon directed the marshal to surrender the property to the principal in the bond. Beyond all doubt, therefore, the claimant acquired the possession of the property lawfully and in pursuance of the order of the Admiralty Court.

Hearing was subsequently had; and the Admiralty Court entered a decree in the case dismissing the libel, and ordered that the property, consisting of the cargo of the steamboat, be restored to the claimant. Due appeal to the Circuit Court was entered by the libellants; and the record shows that the Circuit Court reversed the decree of the District Court, and adjudged and decreed that the steamboat and her cargo be condemned as forfeited to the United States. No appeal was ever taken from that decree, and the allegations of the bill of complaint also show that the Circuit Court entered a decree against the claimant and his sureties in the release bond or stipulation for value in the sum of $204,982.28 with interest and costs of suit.

Attempt is not made to call in question the jurisdiction of the Admiralty Court, nor of the Circuit Court in the exercise of its appellate power in the case. Nothing can be better settled, said Judge Story, than the proposition that the admiralty may take a fidejussory caution or stipulation in cases *in rem*, and that they may in a summary manner render judgment and award execution to the prevailing party. Jurisdiction to that effect is vested in the District Court, and for the purposes of appeal is also possessed by the circuit courts, both courts in such cases being fully authorized to adopt the process and modes of process belonging to the admiralty, and the district courts have an undoubted right to deliver the property on bail and to enforce conformity to the terms of the bailment. Authority to take such security is undoubted, and whether it be by a sealed instrument or by a stipulation in the nature of a recognizance, cannot affect the jurisdiction of the court. Having
p. 41 jurisdiction of the principal cause, the court must possess the | power over all its incidents, and may by monition, attachment, or execution enforce its decree against all who become parties to the proceedings. *Brig Alligator*, 1 Gall. 145; *Nelson* v. *United States*, Pet. C. C. 235.

Bonds given in such cases, says Dunlap, are to all intents and purposes stipulations in the admiralty, and must be governed by the same rules. Original cognizance in such cases is exclusive in the district courts; but the circuit courts, in the exercise of their appellate jurisdiction,

possess the same power to the extent necessary in re-examining the orders and decrees of the subordinate court. Dunlap, Prac. 174; *The Peggy*, 4 C. Rob. 389; *The Ann Caroline*, 2 Wall. 538.

Such security was taken for the cargo seized in the District Court, and no review of that order was asked in the Circuit Court. Where an appeal is taken from the decree of the District Court, the *res* if not released, or the bond or stipulation for value, follows the cause into the Circuit Court, where the fruits of the property if not released, or the bond or stipulation for value, may be obtained in the same manner as in the court of original jurisdiction, the bond or stipulation being in fact nothing more than a security taken to enforce the final decree. *McLellan* v. *United States*, 1 Gall. 227.

It matters not, says the same magistrate, whether the security in such a cause be a bond, recognizance, or stipulation, as the court has an inherent right to take it and to proceed to render judgment or decree thereon according to the course of the admiralty, unless where some statute has prescribed a different rule. *The Octavia*, 1 Mas. 150; *The Wanata, supra.*

Securities of the kind are taken for the property seized for the value of the same when delivered to the claimant, and the stipulation will not be reduced if the property when sold brings less than the appraised value, nor can the court award any damages against the sureties beyond the amount of the stipulation, even if the amount of the stipulation is less than the decree. *The Hope*, 1 Rob. Adm. 155.

Authorities may be found which deny the power even of the Admiralty Court to recall the property for any purpose after the stipulation for value has been given and the property has been delivered to the claimants. *The Wild Ranger*, Brown & | Lush. 671; *Kalamazoo*, 9 Eng. L. & Eq. p. 42
557; s. c. 15 Jur. 885; *The Temiscouta*, 2 Spinks, 211; *The White Squall*, 4 Blatch. 103; *The Thales*, 10 id. 203.

Other decided cases, perhaps for better reason, hold that in case of misrepresentation or fraud, or in case the order of release was improvidently given without any appraisement or any proper knowledge of the real value of the property, it may be recalled before judgment where the ends of justice require the matter to be reconsidered. *The Hero*, Brown & Lush. 447; *The Union*, 4 Blatch. 90; *The Duchese*, Swabey, 264; *The Flora*, Law Rep. 1 Adm. 45; *The Virgo*, 13 Blatch. 255.

Suppose the power, in case of fraud, misrepresentation, or manifest error in the court, exists in the court of original jurisdiction, or even in the Circuit Court, inasmuch as the stipulation for value follows the appeal into that court, still it is clear that no other court possesses any such jurisdiction nor any power to re-examine the discretionary ruling of the admiralty courts in that regard. *Smart* v. *Wolff*, 3 T. R. 340:

Lord Camden v. *Home*, 4 id. 382; *The Wanata, supra*; *Houseman* v. *The Schooner North Carolina*, 15 Pet. 40.

Even if the rule were otherwise, it would not avail the complainants in this case, as they never made any application either to the District Court or to the Circuit Court to recall the property, nor is it now pretended that the amount of the stipulation is not fully equal to the value of the cargo released, nor that the sureties were not perfectly solvent at the time the bond was executed. Nothing of the kind is alleged, and of course nothing of the kind is admitted by the demurrer.

Suitors in cases of seizures on waters navigable from the sea by vessels of ten or more tons burthen are saved the right of a common-law remedy where the common law is competent to give it. 1 Stat. 77.

Given as the bond was on the release of the cargo of cotton in a suit *in rem* for its condemnation, it became the substitute for the property; and the remedy of the libellants, in case they prevailed in the suit *in rem* for condemnation, was transferred from the property to the bond or stipulation accepted by the court as the substitute for the property seized. Common-law remedies in cases of seizure for forfeiture or to
p. 43 enforce a lien | are not competent to effect the object for which the suit is instituted, and consequently the jurisdiction conferred upon the district courts, so far as respects that mode of proceeding, is exclusive. Parties in such cases may proceed *in rem* in the admiralty; and if they elect to pursue their remedy in that mode, they cannot proceed in any other forum, as the jurisdiction of the admiralty courts is exclusive in that mode of proceeding, subject, of course, to appeal to the Circuit Court. *Leon.* v. *Galceran*, 11 Wall. 185; *Steamboat Company* v. *Chase*, 16 id. 522; *The Belfast*, 7 id. 624.

Proceedings *in rem* are exclusively cognizable in the admiralty, and the question whether a case is made for the recall of property released under bond or stipulation in such a case must, beyond all doubt, be determined by the courts empowered to hear and determine the matter in controversy in the pending suit. Nor is there anything unusual in the fact that other parties beside the claimant were interested in the property seized at the time the property was released and the bond for value taken in its place. *In the Matter of William Stover*, 1 Curt. C. C. 201; *The Adeline and Cargo*, 9 Cranch, 244.

Whenever a seizure takes place, it is the right of the owner to appear and file his claim, if he complies with the preliminary order of the court as to costs; but the claim is often made by the master of the vessel or the managing owner, and it may be made by an agent or the consignee, and in the case of a foreign ship it may be filed by the consul of the nation to which the ship belongs. Experience has approved the practice, as the security is rendered sufficient by the sureties; nor is the danger

of loss from their insolvency much if any greater than what arises where the property is retained, from liability to decay or to destruction by fire or flood. Admiralty courts everywhere favor the practice, and the same is sanctioned to a very large extent by the acts of Congress. 9 Stat. 81 ; Rev. Stat., sect. 941.

Many of the preceding observations made to prove that the first ground of claim set up by the complainants cannot be sustained are equally applicable to the second, for the same purpose ; but there is another answer to the second, which is | even more conclusive than any p. 44
thing before remarked to show that the decree of the Circuit Court is correct.

Although the claimant is the sole principal in the bond, yet the allegations in the bill of complaint are that the other two partners were equally interested in the property, and that the claimant procured the release of the property, for the benefit of the copartnership ; and the complainants allege that the transaction should be viewed in all respects as if all the members of the firm had been principals in the bond, inasmuch as the property when released went into the possession of the firm and was sold for the benefit of all the partners. Concede what is not admitted, that evidence to prove that theory may be admissible, it is nevertheless true that the theory must be examined in view of the established fact that the Circuit Court entered a final decree on the bond against the principal and sureties for the whole value of the cargo which was seized and condemned, and the bill of complaint alleges that the decree of the Circuit Court is in full force and unreversed.

None of the authorities afford any countenance whatever to the theory that the property released can be recalled for any purpose after the property has been condemned and the libellants have proceeded to final judgment against the principal and sureties in the bond or stipulation for the release of the property seized. Difficulties of the kind, it would seem, must be insuperable ; but if they could be overcome, there is still another, which of itself is entirely sufficient to show that the second ground of claim is no better than the first.

Judgment has already been rendered against the claimant ; and even admitting that the other two partners may be treated as if they were joint principals in the bond given for the value of the property released, it is quite clear that the judgment against the claimant would be a bar to an action against the other partners upon the bond. Even without satisfaction, a judgment against one of two or more joint contractors is a bar to an action against the others, within the principle of the maxim *transit in rem judicatam*, the cause of action being changed into matter of record. *King* v. *Hoare*, 13 Mee. & W. 494.

Judgment in such a case is a bar to a subsequent action | against p. 45

the other joint contractors, because the contract being joint and not several, there can be but one recovery. Consequently the plaintiff, if he proceeds against one only of the joint contractors, loses his security against the others, the rule being that by the recovery of the judgment, though against one only, the contract is merged and a higher security substituted for the debt. *Sessions* v. *Johnson*, 95 U. S. 347; *Mason* v. *Eldred*, 6 Wall. 231. From which it follows, if the theory of the complainants is correct that the bond is to be regarded as the joint bond of the three partners, that they are without remedy against the other two, as they have proceeded to final judgment against the claimant.

Neither of the other partners signed the bond but the complainants allege that the firm directed the claimant to give the bond for and in the name and style of their said partnership as obligors; to which it may be answered that if the firm gave such directions the claimant did not follow them, as the bond set forth in the record as an exhibit to the bill of complaint shows that it is the individual bond of the alleged senior partner. Nor do the complainants pretend that the other partners ever signed the instrument, but they contend that the demurrer admits every thing which they have alleged.

Matters of fact well pleaded are admitted by a demurrer, but it is equally well settled that mere conclusions of law are not admitted by such a proceeding. *Dillon* v. *Barnard*, 21 Wall. 430; *Ford* v. *Peering*, 1 Ves. Ch. 71; *Lea* v. *Robeson*, 12 Gray (Mass.), 280; *Redmond* v. *Dickerson*, 1 Stockt. (N. J.) 507; *Murray* v. *Clarendon*, Law Rep. 9 Eq. 17; *Nesbitt* v. *Berridge*, 8 Law Times, N. S. 76; Story, Eq. Plead. (7th ed.), sect. 452.

Facts well pleaded are admitted by a demurrer; but it does not admit matters of inference or argument, nor does it admit the alleged construction of an instrument when the instrument itself is set forth in the record, in cases where the construction assumed is repugnant to its language. Authorities to that effect are numerous and decisive; nor can it be admitted that a demurrer can be held to work an admission that parol evidence is admissible to enlarge or contradict a sealed instrument which has become a matter of record in a judicial proceeding. *Beckham* |
p. 46 v. *Drake*, 9 Mee. & W. 78; *Humble* v. *Hunter*, 12 Law Rep. Q. B. 315; *McArdle* v. *The Irish Iodine Company*, 15 Irish C. L. 146; *Sprigg* v. *Bank of Mount Pleasant*, 14 Pet. 201.

Mere legal conclusions are never admitted by a demurrer; nor would it benefit the complainants even if it could be held otherwise, as it must be conceded that the theory of the bill of complaint is that the liability of the three partners is a joint liability, and it is equally well settled that a judgment against one in such a case is a bar to a subsequent action against either of the others, as appears from the authorities already

cited, to which many more may be added. *Robertson* v. *Smith,* 18 Johns. (N. Y.) 459; *Ward* v. *Johnson,* 13 Mass. 148; *Cowley* v. *Patch,* 120 id. 137; *Smith* v. *Black,* 9 Serg. & R. (Pa.) 142; *Beltzhoover* v. *The Commonwealth,* 1 Watts (Pa.), 126.

Where the contract is joint and several the rule is different, to the extent that the promisee or obligee may elect to sue the promisors or obligors jointly or severally; but even in that case the rule is subject to the limitation that if the plaintiff obtains a joint judgment he cannot afterwards sue the parties separately, for the reason that the contract or bond is merged in the judgment, nor can he maintain a joint action after he has recovered judgment against one of the parties, as the prior judgment is a waiver of his right to pursue a joint remedy. *Sessions* v. *Johnson, supra.*

Concede that, and still the complainants aver that they did not know, when they obtained their decree against the claimant and his sureties, that the property belonged to the partnership, or that the bond for value was in fact given by the claimant pursuant to the direction of the other partners.

Averments in a bill of complaint that the parties to a judicial proceeding understood that the legal effect would be different from what it really is, amounts merely to an averment of a mistake of law against which there can be no relief in a court of equity. *Hunt* v. *Rousmaniere's Administrators,* 1 Pet. 1.

Courts of equity may compel parties to execute their agreements, but they have no power to make agreements or to alter those which have been understandingly made; and the same rule applies to judgments duly and regularly rendered and in | full force. 1 Story, Eq. (9th ed.) p. 47 sect. 121; *Bilbie* v. *Lumley,* 2 East, 183.

Fraud is not imputed, nor is it charged that there was any mistake or misrepresentation. Where there is neither accident nor mistake, misrepresentation nor fraud, there is no jurisdiction in equity to afford relief to a party who has lost his remedy at law through mere ignorance of a fact, the knowledge of which might have been obtained by due diligence and inquiry, or by a bill of discovery. *Penny* v. *Martin,* 4 Johns. (N. Y.) Ch. 566; *Anderson* v. *Levan,* 1 Watts & S. (Pa.) 334.

Courts of equity will not grant relief merely upon the ground of accident where the accident has arisen without fault of the other party, if it appears that it might have been avoided by inquiry or due diligence. 1 Story, Eq. (9th ed.), sect. 105.

Ignorance of the facts is often a material allegation, but it is never sufficient to constitute a ground of relief, if it appears that the requisite knowledge might have been obtained by reasonable diligence. Id., sect. 146.

Relief in equity will not be granted merely because a security in an admiralty suit becomes ineffectual, if it appears that it became so without fraud, misrepresentation, or accident, which might have been prevented by due diligence. *Hunt* v. *Rousmanier's Administrators*, 2 Mas. 366; *Sedam* v. *Williams*, 4 McLean, 51.

Having come to the conclusion that the alleged claim of the United States is not well founded, the question of priority becomes wholly immaterial.

Decree affirmed.

Mr. Justice Bradley dissented.

The Florida.

(101 U.S. Reports, 37) 1879.

On the night of Oct. 7, 1864, the rebel steamer 'Florida' was captured in the port of Bahia, Brazil, by the United States Steamer 'Wachusett,' and brought thence to Hampton Roads, where, by a collision, she was sunk. The United States disavowed the act of the captain of the 'Wachusett' in making the capture. He libelled the 'Florida' as a prize of war. *Held*, that the libel was properly dismissed.

Appeal from the Supreme Court of the District of Columbia.

On the night of the 7th of October, 1864, the United States steamer 'Wachusett,' under the command of Commander Collins, captured the rebel steamer 'Florida,' in the port of Bahia, in the empire of Brazil. The 'Florida' had gone there to supply herself with provisions and for
p. 38 the repair of her | engine. She was anchored under cover of a Brazilian vessel of war, on the side next to the shore, and Commander Collins was notified that if he attacked her he would be fired upon by a neighboring fort and by the war vessels of the empire then present. The commander, availing himself of the darkness of the night, approached and fired upon the 'Florida,' received her surrender, attached a hawser to her extending from his vessel and towed her out to sea. He was pursued by a Brazilian war vessel, but escaped with his prize by superior speed. The steamers reached the United States at Hampton Roads. There the 'Florida' was sunk by a collision, and lies where she went down. The American consul at Bahia was on board of the 'Wachusett' at the time of the attack and incited it, and participated in the seizure. He returned to the United States with Commander Collins.

The Brazilian government demanded the return of the vessel and other reparation by the United States. The latter disavowed the capture, and the matter was amicably adjusted.

The commander libelled the 'Florida' as prize of war. The court below dismissed the case, and he appealed to this court.

The case was argued by *Mr. Benjamin F. Butler* and *Mr. Frank W. Hackett* for the appellant.

The following points are taken from Mr. Hackett's brief :—

The captors are entitled to have the question of prize or no prize judicially determined. Act June 30, 1864, 13 Stat. 306. The adjudication is essential to their protection against her former owner, and, if in their favor, gives them also the right to proceed against the colliding vessel, if through its negligence the prize was sunk. The ' Florida's ' hull, guns, &c., are of some determinable value, and the question of ownership therein must be decided.

There is a *res* in existence. The ship is sunk in a river. The court will not inquire whether it will pay to raise her.

The executive has no right to instruct the judicial branch of the government as to the disposition of this libel, nor should its wishes have any force whatever in a tribunal sitting as a high court of prize.

In *The Elsebe* (5 Rob. 173), where Sir William Scott decided | that the p. 39
power of the crown to direct the release of property seized as prize, before adjudication and against the will of the captors, was not taken away by any grant of prize conferred in the Order of Council, the Proclamation, or the Prize Act, orders had been given by the Lords of Admiralty to release the ships before the question was raised in the prize court. In the case at bar, no such order was ever given or promised to Brazil.

For the views of Mr. Wheaton on the subserviency of Sir William Scott to the orders of the crown, see Lawrence's Wheaton, 973 ; Roberts, Adm. & Prize, 480, 519.

In Great Britain, the issue of peace or war is lodged in the crown. The *jus persequendi* in capture being conveyed only in the Orders in Council, and all claims of the captor subordinated to the right of the crown to make such disposition as it pleases of the captured property, the Queen may control the conduct of a prize suit from the beginning. She has supreme power, with the advice of her council, to relax her belligerent rights, and so far to make law for the prize court. *The Phenix*, 1 Spink, 306.

The right to capture in the name of the United States comes not from the Executive, but from Congress. Until condemnation, no property vests in the sovereign or the captor. 10 Op. Att.-Gen. 519. Should the government desire immediately to make use of the captured vessel, an appraisement is made, and her value, in case of a subsequent condemnation, represents the prize fund. Act March 3, 1863, sect. 2.

The act of June 30, 1864 (*supra*), although modelled upon the English prize acts, presents certain features essentially distinct from them. In England, the prize court exercises, in time of war only, a peculiar but extraordinary jurisdiction, specially conferred by Parliament. Roberts,

Adm. & Prize, 444. In this country, the prize courts are ever open to prize causes. Their jurisdiction extends not only to cases specially provided for by Congress, but to limits recognized by international law, or the custom and usage of nations. Id. 445. The captors themselves are authorized, under certain circumstances, to commence proceedings, a right unknown to the English prize law. |

p. 40 The question here is not, as in the 'Elsebe,' whether in time of war the Executive can give up to a foreign nation a captured vessel without making reparation to the captors, but whether, after having gained jurisdiction, and the custody of the vessel, a prize court, sitting in the United States in time of peace, will be controlled by the wishes of the Executive in determining whether the vessel be or be not good prize. The act makes it the duty of the district attorney, upon report of the prize-master, to file a libel against the property, and to 'proceed diligently to obtain a condemnation and distribution thereof.' Rev. Stat., sect. 4618. The Attorney-General, by opposing this libel and asking its dismissal, is asserting a power not granted by the act.

The alleged violation of the neutrality of Brazil is no defence to this libel. This is an objection which the neutral nation alone can interpose. *The Lilla*, 2 Sprague, 177; *The Sir William Peel*, 5 Wall. 517; *The Adela*, 6 id. 266.

A capture made within neutral waters is, as between enemies, deemed to all intents and purposes rightful; it is only by the neutral sovereign that its legal validity can be called in question, and as to him, and him only, is it to be considered void. *The Anne*, 3 Wheat. 435. It was there held that even a consul, unless specially authorized by his government, cannot interpose a claim of violated sovereignty. *The Sancta Trinita*, cited in a note to *The Anne*, shows that the French law is like the English and American in this respect. See 3 Phillimore, Int. Law, p. 453, where *The Anne* is approvingly cited. 1 Kent, Com. (12th ed.) 117, note 1; id. 121; *The Etrusco*, 3 C. Rob. 162, note.

It is objected that the capture of the 'Florida' was in direct violation of the orders of the Secretary of the Navy, and therefore illegal and void; and that the distribution of the proceeds of her sale as prize would be a reward to officers for disobedience.

Those orders are nothing more than regulations for the discipline of the navy. Their violation subjects the offender to a court-martial. 'If the sovereign should, by a special order, authorize the capture of neutral property for a cause manifestly unfounded in the law of nations,
p. 41 it would afford a complete | justification of the captors in all tribunals of prize.' *Maisonnaire* v. *Keating*, 2 Gall. 325. The orders of the Secretary can go no further than international law itself in stamping the capture with illegality. Commander Collins was, by a court-martial, found guilty

of disobeying the orders of the Secretary, but the sentence of dismissal was not approved.

Nor can it be urged that the capture was not for the use and benefit of the United States. It is a matter of public record that this government lodged before the tribunal of arbitration at Geneva claims for direct losses to our merchant marine inflicted by the 'Florida,' amounting to over $4,000,000.

Suppose that immediately on the arrival of the 'Florida' at Hampton Roads the Southern Confederacy had collapsed, Brazil would have demanded reparation, but not the return of the vessel. Would not she in that event have been decreed good prize? What difference between this supposed state of things, and that where, after the war was over and the honor of Brazil had been satisfied, the wrecking company had raised the 'Florida,' pumped her out, and she had been sold, and the proceeds held as a prize fund? In neither case could the United States set up the invasion of neutral rights as against the claim of the captors to have the ship declared good prize.

Besides, the objection that neutrality was violated is completely removed by the seventh section of the act of 28th July, 1866 (14 Stat. 322), which enacts 'that the Secretary of the Navy be, and he is hereby, authorized to dispose of the property saved from the rebel steamer "Florida," and distribute the proceeds thereof as other prize-money is required by law to be distributed.' In accordance with this provision, the sum of $20,399.43 was distributed as prize-money to the captors, being, as between them and the United States, the value of certain property captured on board. Congress, therefore, sanctioned the capture as lawful.

The Solicitor-General, contra.

MR. JUSTICE SWAYNE, after stating the facts, delivered the opinion of the court.

The legal principles applicable to the facts disclosed in the | record are p. 42
well settled in the law of nations, and in English and American jurisprudence. Extended remarks upon the subject are, therefore, unnecessary. See Grotius, De Jure Belli, b. 3, c. 4, sect. 8; Bynkershoek, 61, c. 8; Burlamaqui, vol. ii. pt. 4, c. 5, sect. 19; Vattel, b. 3, c. 7, sect. 132; Dana's Wheaton, sect. 429 and note 208; 3 Rob. Ad. Rep. 373; 5 id. 21; *The Anne*, 3 Wheat. 435; *La Amistad de Rues*, 5 id. 385; *The Santissima Trinidad*, 7 id. 283, 496; *The Sir William Peel*, 5 Wall. 517; *The Adela*, 6 id. 266; 1 Kent, Com. (last ed.), pp. 112, 117, 121.

Grotius, speaking of enemies in war, says: 'But that we may not kill or hurt them in a neutral country, proceeds not from any privileges attached to their persons, but from the right of the prince in whose dominions they are.'

A capture in neutral waters is valid as between belligerents. Neither

a belligerent owner nor an individual enemy owner can be heard to complain. But the neutral sovereign whose territory has been violated may interpose and demand reparation, and is entitled to have the captured property restored.

The latter was not done in this case because the captured vessel had been sunk and lost. It was, therefore, impossible.

The libellant was not entitled to a decree in his favor, for several reasons.

The title to captured property always vests primarily in the government of the captors. The rights of individuals, where such rights exist, are the results of local law or regulations. Here, the capture was promptly disavowed by the United States. They, therefore, never had any title.

The case is one in which the judicial is bound to follow the action of the political department of the government, and is concluded by it. *Phillips* v. *Payne*, 92 U. S. 130.

These things must necessarily be so, otherwise the anomaly would be possible, that, while the government was apologizing and making reparation to avoid a foreign war, the offending officer might, through the action of its courts, fill his pockets with the fruits of the offence out of which the controversy arose. When the capture was disavowed by our government, it became for all the purposes of this case as if it had not occurred. |

p. 43 Lastly, the maxim, '*ex turpi causa non oritur actio*,' applies with full force. No court will lend its aid to a party who founds his claim for redress upon an illegal act.

The Brazilian government was justified by the law of nations in demanding the return of the captured vessel and proper redress otherwise. It was due to its own character, and to the neutral position it had assumed between the belligerents in the war then in progress, to take prompt and vigorous measures in the case, as was done. The commander was condemned by the law of nations, public policy, and the ethics involved in his conduct.

Decree affirmed.

Porter v. United States.

(106 U.S. Reports, 607) 1882.

1. Bounty was not allowed by the act of Congress of June 30, 1864, c. 174, where vessels of the enemy were, during the rebellion, destroyed by the combined action of the sea and land forces of the United States.
2. Property seized upon any waters of the United States, other than bays or harbors on the sea-coast, was not maritime prize, nor was any bounty paid by the United States for the destruction thereof.

APPEAL from the Supreme Court of the District of Columbia.

This was a proceeding termed a libel of information filed in the

Supreme Court of the District of Columbia, on behalf of David D. Porter and others, officers and men of the North Atlantic Squadron, to recover the bounty provided by the act of Congress of June 30, 1864, c. 174, regulating prize proceedings and the distribution of prize money.

The eleventh section of that act declares 'that a bounty shall be paid by the United States for each person on board any ship or vessel of war belonging to an enemy at the commencement of an engagement, which shall be sunk or otherwise destroyed in such engagement by any ship or vessel belonging to the United States, or which it may be necessary to destroy in consequence of injuries sustained in action, of one hundred dollars, if the enemy's vessel was of inferior force, and of two hundred dollars, if of equal or superior force, to be divided among the officers and crew in the same manner as prize money; and when the actual number of men on board any such vessel cannot be satisfactorily ascertained, it shall be estimated according to the complement allowed to vessels of its class in the navy of the United States; and there shall be paid as bounty to the captors of any vessel of war captured from an enemy, which they may be instructed to destroy, or which shall be immediately destroyed for the public interest, but not in consequence of injuries received in action, fifty dollars for every person who shall be on board at the time of such capture.'

The libel, in substance, alleges that between the 8th of October, 1864, and the 28th of April, 1865, the North Atlantic Squadron, consisting of eleven ships of war—which are mentioned— | was under the command of p. 608
David D. Porter, now admiral of the navy; that by orders of the President of the United States and of the Secretary of the Navy he ascended the James and York Rivers, in Virginia, with the vessels composing his squadron, for the purpose of expelling the naval and military forces of the Confederate States from those waters, and to assist in the capture of Richmond; that previously to April 1, 1865, the Confederates, in order to obstruct the passage of the vessels, had erected along those rivers batteries and other means of defence; had caused boats to be sunk in the streams and trees to be filled in and across them; and had placed in the James River, in support of the defences of Richmond, many armed steam batteries, steam rams, iron-clad ships of war, and armed steamers, of which eleven are mentioned by name; that the fleet removed the obstructions from the river, attacked the naval forces of the Confederates, destroyed some of the vessels, and caused the enemy to destroy others to prevent them from falling into the possession of the United States, and that nine vessels, which are named, were thus destroyed.

The libel further alleges that the vessels of the enemy, aided by the guns of the batteries and the obstructions in the river, constituted a superior force to that under the command of Admiral Porter; and

claims that by the act of Congress, cited above, the officers and men of the squadron were entitled to a bounty of $200 a head for each man on the enemy's vessels at the commencement of the engagement. It therefore prays that such bounty may be allowed to them ; and that in estimating the numerical strength of the enemy, the court will take into consideration and adjudge that all persons engaged on land, as well as those on the water, in resisting the United States naval forces in that engagement, may be held to have been on board of the enemy's vessels, and treated as adjuncts to them ; and, furthermore, as it will be difficult, and in some instances impossible, by reason of the lapse of time and from other causes, to show the number of men that were on and about the enemy's vessels when the engagement commenced, the libel prays that such forces may be estimated according to the complement of men allowed to vessels of the same capacity in the navy of the United States. |

p. 609 Upon this libel process was ordered to be issued to the Secretary of the Navy, notifying him of the commencement of the suit ; and subsequently testimony in the case was taken, and such proceedings were had as resulted in a decree in favor of the libellants, by the Supreme Court of the District of Columbia, sitting in admiralty, and held by a single justice. The case being subsequently carried before the full court, the decree was reversed and the libel dismissed.

From the decree of dismissal the case was brought by appeal to this court.

Mr. Jerome F. Manning for the appellants.

The Solicitor-General, contra.

Mr. Justice Field delivered the opinion of the court, and, after stating the case as above, proceeded as follows :—

Two objections are made to the recovery of the bounty claimed by the libellants : one, that the destruction of the Confederate vessels was effected by the joint action of the army and navy ; the other, that it took place on the inland waters of the United States.

For the determination of the first of these objections, it will be necessary to consider the movements of the fleet under command of Admiral Porter, immediately preceding the capture of Richmond. The record enables us to do this, although officers present on the vessels differ in their recollection of dates.

On the morning of April 2, 1865, General Lee, commanding the enemy's forces around Richmond, informed the Confederate authorities that he should immediately withdraw his lines and evacuate the city. The withdrawal and evacuation took place on the evening of that day. Information of his purpose was undoubtedly communicated to Admiral Porter soon after it was generally known in Richmond, which was before noon. At that time there were in James River, for some miles below

Richmond, obstructions which the Confederates had placed to prevent the ascent of the Union fleet. Vessels filled with stone had been sunk, and numerous torpedoes planted in the stream. Batteries had also been erected along the river. Some of the obstructions were just above the lower end of what was known as Dutch Gap Canal, about sixteen miles by the river from | Richmond, which were originally placed there by the p. 610
Confederates, and afterwards maintained by the forces of the United States. Two miles above them was Howlett's Confederate battery. Eight miles above the Dutch Gap Canal was Chaffin's Bluff; and one mile above that on the opposite side of the river was Drury's Bluff, seven miles below Richmond. General Lee's lines extended across the river between the two bluffs, and below them. Above the obstructions near Dutch Gap Canal several Confederate vessels of war were stationed. When General Lee was compelled to abandon his lines, orders were given that the batteries on James River should be withdrawn, and the Confederate vessels destroyed.

As soon as Admiral Porter, on the 2d of April, was informed, or had reason to believe, that General Lee intended to retreat from Richmond, he gave orders for the removal of the obstructions in the river, and for his vessels to open fire on the Confederate batteries within range, and to push on through the obstructions as fast as they were carried away, first sending boats ahead to remove the torpedoes. These orders were carried out with great gallantry and spirit; a heavy fire was opened on the batteries, and during the following night a channel was cut through the obstructions. Soon after the fleet opened fire, the enemy, to prevent the capture of his vessels, commenced destroying them,—setting fire to some of them, and blowing up others. On the next day, the 3d, the fleet passed through the obstructions, and moved up to Drury's Bluff, capturing one of the enemy's vessels which had not been destroyed,—the iron-clad ram 'Texas.' Another of the enemy's vessels, the 'Beaufort,' was subsequently captured further up the river. At Drury's Bluff the vessels were detained by the obstructions until the 4th. On that day the Admiral, accompanied by President Lincoln, proceeded up to Richmond.

Although, in the movements of the Admiral's fleet in its ascent of James River and in its attack on the batteries, he was not assisted by the actual presence of any portion of the army of the United States, so that the capture of the two vessels—the 'Texas' and the 'Beaufort'—and the destruction of the other vessels, may, in that sense, be said to have been effected by his fleet alone, yet, without the aid of the army the | result mentioned would not probably have been accomplished. Certainly, p. 611
its movements contributed most essentially to the success of the fleet. For several months it had been lying near Richmond under the command of General Grant, with the avowed purpose of capturing that city, and

of destroying the Confederate forces. The result of the battle of Five Forks, on the 1st of April, satisfied the Confederate commander that he could not hold his lines and protect Richmond. The withdrawal of his troops and the evacuation of Richmond followed. Had they not been thus forced to retire, and his lines had continued to cross James River between Chaffin's Bluff and Drury's Bluff, it would have been almost, if not quite, impossible for the fleet of Admiral Porter to ascend the river. The fire of the shore batteries, with the assistance of the Confederate troops near by, would have checked any advance, supported, as they would have been, by the Confederate vessels and the torpedoes in the stream. It is plain, therefore, that whatever was accomplished by the fleet of the Admiral in James River, on the second and third days of April, 1865, must be considered as the result of the co-operative action of both the army and the navy. It matters not that the movements of the army were miles distant from the operations of the fleet. They relieved that fleet from resistance which might and probably would have defeated any attempt to ascend the river above the shore batteries and destroy the armed vessels of the enemy.

Prize money, or bounty in lieu of it, is not allowed by the laws of Congress where vessels of the enemy are captured or destroyed by the navy with the co-operation of the army. To win either, the navy must achieve its success without the direct aid of the army, by maritime force only. No pecuniary reward is conferred for anything taken or destroyed by the navy when it acts in conjunction with the army in the capture of a fortified position of the enemy, though the meritorious services and gallant conduct of its officers and men may justly entitle them to honorable mention in the history of the country. *The Siren*, 13 Wall. 389.

The second objection to a recovery, that the destruction of the Confederate vessels was effected upon inland waters of the United States,
p. 612 is equally clear, if the term 'property,' used in | the seventh section of the act of July 2, 1864, c. 225, can be construed—as counsel seem to take for granted—to embrace public vessels of the enemy. That act provides, among other things, for the collection of captured and abandoned property, and is in addition to the act on that subject of March 12, 1863, c. 120. The seventh section declares: 'That no property seized or taken upon any of the inland waters of the United States by the naval forces thereof, shall be regarded as maritime prize; but all property so seized or taken shall be promptly delivered to the proper officers of the courts, or as provided in this act and in the said act approved March twelve, eighteen hundred and sixty-three.'

The term 'inland' as here used was evidently intended to apply to all waters of the United States upon which a naval force could go, other than bays and harbors on the sea-coast. In most instances property of

the enemy on them could be taken, if at all, by an armed force without the aid of vessels of war. These were seldom required on such waters, except when batteries or fortified places near them were to be attacked in conjunction with the army. As observed by the court in *The Cotton Plant*, Congress probably anticipated, in view of the state of the war when the act was passed, that most of the captures on the rivers would be made by the army. 10 Wall. 577.

James River is an inland water in any sense which can be given to the term 'inland.' It lies within the body of counties in Virginia. For miles below Richmond, and below the obstructions mentioned, a person can see from one of its banks what is done on the other. Rivers across which one can thus see are inland waters. It matters not that the tide may ebb and flow for miles above their mouths; that fact does not make them any part of the sea or bay into which they may flow, though they may be arms of both. *United States* v. *Grush*, 5 Mason, 290.

Decree affirmed.

Cushing v. Laird. Foster v. Cushing.

(107 U.S. Reports, 69) 1882.

1. When persons summoned as garnishees in a libel in admiralty *in personam* are adjudged by the court to have a fund of the principal defendant in their hands and to pay it into court, and the libellant afterwards obtains a final decree against him with an award of execution against the fund in their hands, the first order is interlocutory, and they can appeal from the last decree only.
2. A final decree of acquittal and restitution to the only claimant in a prize cause determines nothing as to the title in the property, beyond the question of prize or no prize; and another person, who actually conducts the defence in the prize cause in behalf and by consent of the claimant, without disclosing his own title under a previous bill of sale from the claimant, is not estopped to contest the claimant's title in a subsequent suit brought by creditors attaching the property or its proceeds as belonging to the claimant.

APPEALS from the Circuit Court of the United States for the Southern District of New York.

The facts are stated in the opinion of the court.

Mr. J. Langdon Ward and *Mr. Robert D. Benedict* for Cushing.

Mr. J. Hubley Ashton, Mr. Cornelius Van Santvoord, Mr. A. J. Vanderpool, and *Mr. James Thomson, contra.*

MR. JUSTICE GRAY delivered the opinion of the court.

This is a libel in admiralty, filed in the District Court for the Southern District of New York by John N. Cushing and others against John Laird, Jr., to recover damages for the destruction of the libellants' vessel, the 'Sonora,' by the 'Alabama.' The defendant was not found and

never appeared in the cause, and his credits and effects were attached in the hands of Foster & Thomson, garnishees.

The garnishees answered that they had in their hands a fund amounting to $31,441.62, known as the proceeds of the steamer 'Wren,' which was the property of Charles K. Prioleau and not of Laird. Upon the trial of the issue raised by this answer, the District Court, in April, 1873, adjudged that the fund belonged to Laird, and ordered the garnishees to pay it into court. See 6 Benedict, 408. From that decree the garp. 70 nishees | appealed to the Circuit Court. The District Court afterwards, in September, 1873, entered a decree in favor of the libellants against Laird for the sum of $143,298.70, and costs, 'and that the libellants have execution thereon, to satisfy this decree, against the property of the said respondent, and especially against his property, credits, and effects in the hands of Foster & Thomson, garnishees.' From this decree also the garnishees appealed to the Circuit Court.

The Circuit Court dismissed the first appeal, and retained the cause for hearing on the second appeal only; and, upon consideration, entered a decree by which it was adjudged that the fund in the hands of the garnishees was not the property of Laird, and could not be subjected to the payment of the decree against him, the attachments against the garnishees were discharged, and both decrees of the District Court, so far as affected them and the fund in their hands, were reversed with costs. See 15 Blatchf. 219.

The findings of fact by the Circuit Court are printed at length in 15 Blatchf. 220–236, and, so far as they are material to be stated, are as follows:—

The steamer 'Wren' was built at Birkenhead, England, in 1864, by Laird Brothers, and was registered on the 24th of December, 1864, at Liverpool, in accordance with the laws of Great Britain, in the name of John Laird, Jr., as owner; a certificate of the registry was issued in due form; the vessel sailed from Liverpool, having the certificate on board as part of her ship's papers, and it did not appear that she ever again entered a British port. On the 3d of January, 1865, after she had left Liverpool, Laird executed to Charles K. Prioleau, of Liverpool, a member of the firm of Fraser, Trenholm, & Company, for the consideration of £15,450, a bill of sale of the vessel, which, on the 1st of May, 1865, was duly entered at the custom-house in Liverpool, and the vessel registered in the name of Prioleau as owner. On the 13th of June, 1865, on the high seas, on a voyage from Havana to Liverpool, by the way of Halifax, Nova Scotia, some of the crew took forcible possession of the vessel, overcame her officers, ran her into Key West, and there delivered her to the naval authorities of the United States.

p 71 On the 16th of June, 1865, the Attorney of the United | States for

the Southern District of Florida filed in the District Court for that district an information against the vessel as prize of war. She was taken into the custody of the marshal, and a monition issued to all persons interested to appear on the 27th of June and show cause against a decree of condemnation. On the 26th of June Edward C. Stiles, master of the vessel, appeared in court and filed a claim, stating that he was the master, and, as such, the lawful bailee of the vessel, and claimed the same for the owner thereof; and that Laird, a British subject, residing in England, was the true and *bona fide* owner of the vessel, and that no other person was the owner thereof, as appeared by her register in the possession of the court, and as he was informed and believed; denying that she was a prize of war, and praying restitution and damages.

The only certificate of registry found on board was that granted on the 24th of December, 1864, upon which were noted, at the British Consulate in Havana, changes of masters on the 24th of March and the 10th of June, 1865, and at the foot of which was the following: 'NOTE. A certificate of the registry granted under the Merchant Shipping Act, 1854, is not a document of title. It does not necessarily contain notice of all changes of ownership, and in no case does it contain an official record of any mortgage affecting the ship.'

On the 17th, 19th, and 20th of June, 1865, the depositions of the master and other officers of the vessel were taken *in preparatorio*; and on the 27th of June the court proceeded to hear the case upon the allegations and pleadings, the depositions taken *in preparatorio*, and the papers, letters, and writings found on board the vessel. On the 29th of June the court, of its own motion, directed the prize commissioner to take immediately the testimony of the officers, and of any other witnesses who might be produced by the claimants from persons on board the vessel, upon specified interrogatories; of two persons named, and any others on board produced by the captors, upon some of the same interrogatories; and of any witnesses, produced either by the captors or the claimants from persons not on board, upon certain other interrogatories; and allowed two days to the parties to produce witnesses. Under this order testimony was taken; and on the 3d of July | the court resumed p. 72
the hearing upon the allegations and pleadings, the depositions taken *in preparatorio*, the papers found on board, and the depositions taken under the order allowing further proof.

The court, on the 8th of July, announced its opinion, condemning the vessel, but, on account of exceptions taken to some rulings, delayed making a decree in form until the 15th of August, when it was duly entered, reciting that a claim had been interposed by the master in behalf of Laird, that the case had been heard as aforesaid, and that it appeared to the court that the 'Wren' was, at the time of capture, the property

of enemies of the United States; and adjudging her to be condemned and forfeited to the United States as lawful prize of war, and to be sold by the marshal, and the proceeds to be deposited with the Assistant Treasurer of the United States, subject to the order of the court. From that decree the claimant, on the same day, appealed to this court. The vessel was afterwards sold, and the proceeds of the sale deposited with the Assistant Treasurer.

Prioleau still resided in England, and it did not appear that he had any actual knowledge of the proceedings for condemnation until after the entry of the decree. He afterwards retained Foster & Thomson, the garnishees in this case, attorneys and counsellors at law in the city of New York, to do whatever might be necessary for the protection of his interests; and they procured a copy of the record of the District Court and had the appeal docketed in this court, and employed additional counsel, who argued the case here on the record sent up. No additional testimony was taken, and no change in the pleadings made or applied for. Upon the argument in this court, the counsel for the United States insisted that it appeared from the evidence that the vessel, at the time of the capture, was the public property of rebel enemies, and, in support of this position, referred to the testimony of witnesses who swore that Fraser, Trenholm, & Company were her owners. The counsel for the appellant insisted that there was not a particle of evidence that she was ever enemies' property, but that the evidence was conclusive that she was at all times the property of Laird, a British neutral. |

p 73 This court, at December Term, 1867, reversed the decree of the District Court, and remanded the cause, with directions to restore the vessel to the claimant, without costs. Mr. Justice Nelson, in delivering the opinion, said that the only question in the case was whether the vessel was the property of enemies of the United States; and, in discussing this question, observed that upon the proofs that the claimant built the vessel and put the master in command in this, her first voyage, the presumption would seem to be very strong, if not irresistible (nothing else in the case), that he continued the owner for the short period of six months that elapsed after she was built and before the seizure took place; that in addition to this she was in command of a master claiming to represent Laird as owner; that these acts, in connection with the registry, afforded strong evidence that the title of the vessel was in the claimant, and that, although it was not unnatural to suspect, from the surrounding facts and circumstances, that the so-called Confederate States or their agents had some interest in or connection with her, there was no sufficient legal proof that they owned the vessel.

After that decree of this court, Foster & Thomson made and sent to Prioleau a draft of a power of attorney to be executed by Laird and by

Stiles, and in due time received from Prioleau the power so executed, authorizing Foster and Thomson to receive from the United States, or from any officer or depositary thereof, restitution of the proceeds of the sale of the 'Wren;' and obtained a mandate from this court, and sent it, together with a copy of their authority, to the Attorney of the United States for the Southern District of Florida, requesting him to see the appropriate decree entered and a draft upon the Assistant Treasurer in New York for the payment of the money to their order transmitted to them, and also employed F. A. Dockray, an attorney in Florida, to aid them in procuring the money from the registry of the court; and did not, in any of their letters to the District Attorney or to Dockray, mention that any other person than Laird was or pretended to be the owner of the fund in court.

Some of the libellants in this case having filed a libel in that court to recover for the wrong complained of in the present | suit, with a prayer p. 74
for an attachment of the fund in the registry, and an attachment having been made accordingly, an arrangement was made between Foster & Thomson and J. L. Ward, proctor for the libellants, with a view of transferring the litigation to New York for the convenience of the parties, and of having the fund transmitted to Foster & Thomson in New York, as authorized attorneys in fact of Laird, to be held by them long enough to enable process to be served upon them in behalf of the libellants. Pursuant to that arrangement, Dockray, acting under his employment by Foster & Thomson, appeared in behalf of Laird in the libel filed against him in Florida, and claimed the proceeds of the 'Wren' in the registry of that court, and exhibited the mandate of this court; and upon his motion, with Ward's consent, the attachment was dismissed, and a decree entered, by which, after reciting the decree of this court reversing the decree of condemnation and ordering the property to be restored to the claimant, it was ordered, adjudged, and decreed that the proceeds of the 'Wren,' after deducting costs, charges, and expenses, and amounting to $31,441.62, on deposit with the Assistant Treasurer of the United States at New York, be paid to said John Laird, claimant, and, it appearing that Foster & Thomson were his lawfully authorized attorneys, that said proceeds be paid to them. That sum was accordingly transmitted to Foster & Thomson, and is the matter in controversy in this case. In the course of the negotiations which preceded that arrangement, Ward was in no manner given to understand that there was any ownership or claim of ownership of the fund, other than such as appeared on the fact of the record and the power of attorney filed with the mandate, and in point of fact he did not know or have any reason to believe that Foster & Thomson were acting in any other capacity than as attorneys for Laird and Stiles, representing their several interests, as disclosed by

the record in this court. Foster & Thomson never had any personal communication with Laird, nor received any instructions from him, but were actually employed by Prioleau, and communicated with Laird through him only.

The libellants requested the Circuit Court to make the following con-
p. 75 clusions of law: ' 1. The Prize Court in Florida | condemned the " Wren " as enemy property. 2. The Supreme Court in reversing that decree decided that the " Wren " was not enemy property, but was the property of John Laird, Jr. 3. The garnishees, acting for Prioleau, procured the Supreme Court to make that decision. 4. Prioleau is chargeable with notice of all the proceedings in the Prize Court and in the Supreme Court. 5. The proceeds of the " Wren " in the Prize Court were subject to the attachment served upon them in the District Court of Florida at the time when the consent of the libellants' proctor to the dissolution of such attachment was obtained. 6. The decision of the Supreme Court binds the garnishees herein and Prioleau, and is conclusive against them, and cannot be re-examined in this suit. 7. Prioleau is estopped from denying in this suit that John Laird, Jr., was the owner of the " Wren," and of the proceeds thereof when the same were attached herein. 8. The garnishees are estopped from setting up that these funds in their hands are not subject to the attachment in this suit; and also from setting up that John Laird, Jr., was not the owner thereof, or that Prioleau was the owner thereof, when the attachment herein was served.'

The Circuit Court declined to make the conclusions of law proposed by the libellants, and made and filed the following conclusions of law: ' 1. As Prioleau was in fact the owner of the " Wren " at the time of her capture, he was in law the owner of the proceeds in the registry of the court after her sale. 2. The sentence of acquittal in the prize cause relieved the fund in court from all claim on the part of the captors, and left the owners free to assert their rights as against the world. 3. The decree in the prize suit did not adjudge the fund to Laird as owner, or deprive Prioleau of his interest. 4. The delivery of the fund to Foster & Thomson, as agents of Laird, placed them in the same situation in respect to it that would have been occupied by Laird if it had been put into his hands instead of theirs. 5. As Laird was not the real, but only the apparent, owner of the fund, he would have taken it, if payment had been made to him, in trust for Prioleau. 6. Foster & Thomson, as his agents, hold it upon the same trust, and are not accountable to the libellants in this action. 7. The decree of the District Court, requir-
p. 76 ing Foster & Thomson to pay the fund | into court, and subjecting it to the payment of the amount found due the libellants from Laird, was wrong and should be reversed.'

The Circuit Court allowed a bill of exceptions tendered by the libellants,

in which they excepted to each of its conclusions of law, and to its refusal to make each of the conclusions of law proposed by them.

The libellants appealed from the last decree of the Circuit Court in favor of the garnishees; the garnishees appealed from the earlier decree of that court, dismissing their appeal from the first order of the District Court against them; and the two appeals have been argued together.

In a court of admiralty, as in a court of common law, a process of foreign attachment is auxiliary and incidental to the principal cause. Second Rule of Practice in Admiralty, 3 How. iii. *Manro* v. *Almeida*, 10 Wheat. 473; *Atkins* v. *The Disintegrating Company*, 18 Wall. 272. Neither the principal defendant nor the garnishees can appeal until after a final decree against them. The first decree against these garnishees, ascertaining their liability, was interlocutory only, and, if the libellants had ultimately failed to recover judgment against the principal defendant and execution against the garnishees, would have been of no avail to the libellants, and of no effect against the garnishees. The appeal of the garnishees from this interlocutory order of the District Court was therefore rightly dismissed by the Cricuit Court, and the order of dismissal must be affirmed.

Upon the merits of the case, as presented by the appeal of the libellants from the final decree of the Circuit Court in favor of the garnishees, this court, after full consideration of the elaborate arguments of counsel, is satisfied of the correctness of that decree upon principle and authority.

Prize courts are not instituted to determine civil and private rights, but for the purpose of trying judicially the lawfulness of captures at sea, according to the principles of public international law, with the double object of preventing and redressing wrongful captures, and of justifying the rightful acts of the captors in the eyes of other nations. The ordinary course of proceeding in prize causes is ill adapted to the ascertainment of | controverted titles between individuals. It is wholly different from p. 77
those which prevail in municipal courts of common law or equity, in the determination of questions of property between man and man.

In *Lindo* v. *Rodney*, 2 Doug. 613, 614, Lord Mansfield said: 'The end of a prize court is, to suspend the property till condemnation; to punish every sort of misbehavior in the captors; to restore instantly, *velis levatis* (as the books express it, and as I have often heard Dr. Paul quote), if, upon the most summary examination, there don't appear a sufficient ground; to condemn finally, if the goods really are prize, against everybody, giving everybody a fair opportunity of being heard. A captor may, and must, force every person interested to defend, and every person interested may force him to proceed to condemn, without delay.'

From the necessity of the case, and in order to interrupt as little as

may be the exercise of the belligerent duties of the captors, or the voyage and trade of the captured vessel if neutral, the proceedings are summary. The libel is filed as soon as possible after the prize has been brought into a port of the government of the captors, and does not contain any allegation as to title, nor even set forth the grounds of condemnation, but simply prays that the vessel may be forfeited to the captors as lawful prize of war. The monition issued and published upon the filing of the libel summons all persons interested to show cause against the condemnation of the property as prize of war, and is returnable within a very few days, too short a time to allow of actual notice to or appearance or proof in behalf of owners residing abroad.

The law of nations presumes and requires that in time of war every neutral vessel shall have on board papers showing her character, and shall also have officers and crew able to testify to facts establishing her neutrality. The captors are therefore required immediately to produce to the Prize Court the ship's papers, and her master, or some of her principal officers or crew, to be examined on oath upon standing interrogatories, and without communication with or instruction by counsel. The cause is heard in the first instance upon these proofs, and if they
p. 78 show clear ground for condemnation or for acquittal, no | further proof is ordinarily required or permitted. If the evidence *in preparatorio* shows no ground for condemnation, and no circumstances of suspicion, the captors will not ordinarily be allowed to introduce further proof, but there must be an acquittal and restitution. *The Aline & Fanny*, Spinks Prize Cases, 322, and 10 Moo. P. C. C. 491 ; *The Sir William Peel*, 5 Wall. 517, 534. When further proof is ordered, it is only from such witnesses and upon such points as the Prize Court may in its discretion think fit.

It is doubtless true, as said by Chief Justice Marshall in the passage cited by these libellants from *Jennings* v. *Carson*, 4 Cranch, 2, 23, that 'the proceedings of that court are *in rem*, and their sentences act on the thing itself. They decide who has the right, and they order its delivery to the party having the right. The libellant and the claimant are both actors. They both demand from the court the thing in contest.' But the point there adjudged was that, pending the proceedings, the property was in the possession of the court, and not left in the possession of either party, without security ; and there is no intimation that a claimant, who proves his right, as against the captors, to have the possession of the vessel restored to him, must also prove his title in the vessel as against other persons not before the court.

The Prize Court will not indeed permit a stranger to dispute the right of the captors, and generally requires a claim to be made by or in behalf of the general owner, and upon oath. But the claimant is required to give evidence of a title to the property, not for the purpose of having

that title established by the decree of the Prize Court, but only for the purpose of showing that he is acting in good faith, and is entitled to contest the question of prize or no prize, and to have restitution of possession in case of acquittal. From the necessity of the case, the claim is often put in by the master on behalf of the owner, and it is sufficient if the master's oath is to belief only.

By the practice prevailing in England at the time of the Declaration of Independence, and for some years before and after, the master often put in a general claim for himself and all others interested, without naming them. *The Hendric & | Alida*, Marriott, 96, 99, 123; *The* p. 79
Prospérité, id. 164; *The Jungfre Maria*, id. 273, 283. In the report made in 1753 by Sir George Lee, Judge of the Prerogative Court, Dr. Paul, Advocate-General, Sir Dudley Ryder, Attorney-General, and afterwards Chief Justice, and Mr. Murray, Solicitor-General, and afterwards Lord Mansfield, which was embodied in the famous answer to the Prussian Memorial, the only requisite mentioned of a claim of ship or goods is that it 'must be supported by the oath of somebody, at least as to belief.' 1 Collectanea Juridica, 129, 135. Sir William Scott and Sir John Nicholl, in their letter to Chief Justice Jay when Minister to England in 1794, stating the general principles of proceeding in prize causes in British courts of admiralty, observed that those principles could not be more correctly or succinctly stated than in an extract which they gave from that report, including the passage just quoted; and, in describing the measures which ought to be taken by the neutral claimant, said, 'The master, correspondent, or consul applies to a proctor, who prepares a claim, supported by an affidavit of the claimant, stating briefly to whom, as he believes, the ship and goods claimed belong, and that no enemy has any right or interest in them.' Wheaton on Captures, 311, 314.

It has often been said by judges of high authority that the claimant has the burden of proving his title to the property. But in the leading cases in which this was said there was but a single claimant, and either, as in *The Walsingham Packet*, 2 C. Rob. 77, 87, and *The Bremen Flugge*, 4 id. 90, 92, the words 'support his title' were used as equivalent to the general expression 'prove the neutrality of the property;' *Croudson* v. *Leonard*, 4 Cranch, 434, 437; *The Mary*, 9 Cranch, 126, 146; Story's note, 1 Wheat. 506; *The Amiable Isabella*, 6 Wheat. 1, 77; or else the neutral claimant asserted a title in property appearing to have once belonged to an enemy, as in *The Rosalie & Betty*, 2 C. Rob. 343, 359; *The Countess of Lauderdale*, 4 id. 283; and *The Soglasie*, 2 Spinks, 101; s. c. Spinks Prize Cases, 104. And in *The Maria*, 11 Moo. P. C. C. 271, 286, 287, Lord Chief Justice Cockburn, delivering the judgment of himself, Lords Justices Knight Bruce and Turner, Sir Edward Ryan, Sir

p. 80 John Dodson, and Mr. Justice | Maule, reversing upon the facts a decree of Dr. Lushington, emphatically declined to assent to the application of the rule to a case in which the property appeared to be neutral, although not shown to belong to the claimant.

The proceedings of a prize court being *in rem*, its decree, as is now universally admitted, is conclusive, against all the world, as to all matters decided and within its jurisdiction. *Williams* v. *Armroyd*, 7 Cranch, 423 ; *Bradstreet* v. *Neptune Ins. Co.*, 3 Sumn. 600. But it does not, as Chief Justice Marshall observed, ' establish any particular fact, without which the sentence may have been rightfully pronounced.' If the vessel is condemned as prize and sold by order of the court, the decree of condemnation and sale is conclusive evidence of the lawfulness of the capture and of the title of the purchaser. But if, as is usual, it does not state the ground of condemnation, it is not even conclusive that the vessel is enemy's property, for it may have been neutral property condemned for resisting a search, or attempting to enter a blockaded port ; and, ' of consequence, this sentence, being only conclusive of its own correctness, leaves the fact of real title open to investigation.' *Maley* v. *Shattuck*, 3 Cranch, 458, 488.

So a decree of acquittal and restitution conclusively determines as to all the world that the vessel is not lawful prize of war. *The Apollon*, 9 Wheat. 362 ; *Magoun* v. *New England Marine Ins. Co.*, 1 Story, 157. But, as it operates *in rem*, it is not invalidated by the fact that pending the proceedings the sole claimant has died and his representatives have not been made parties. *Penhallow* v. *Doane*, 3 Dall. 54, 86, 91 ; Story's note, 2 Wheat. Appendix 68 ; 3 Phillimore's International Law, sect. 492. It does not establish the title of any particular person, unless conflicting claims are presented to the court and passed upon. In *Penhallow* v. *Doane*, Mr. Justice Iredell said : ' In case of a *bona fide* claim, it may appear to be good by the proofs offered to the court, but another person living at a distance may have a superior claim which he has no opportunity to exhibit. It is true a general monition issues, and this is considered notice to all the world, but though this be the construction of the law from the necessity of the case, it would be absurd to infer in fact
p. 81 that all the world had actual notice, | and therefore no superior claimant to the one before the court could possibly exist.' 3 Dall. 91.

When no other person interposes a claim, restitution of ship or goods is ordinarily decreed to the master as representing the interests of all concerned, or to the person who by the ship's papers or by the master's oath appears to be the owner. As said by Mr. Justice Story, and repeated by Sir Robert Phillimore, ' The property, upon a decree of restitution, may be delivered to the master as agent of the shipper, for in such case the master is agent of the shipper, and is answerable to him.' 2 Wheat.

Appendix, 70; 3 Phillimore's International Law, sect. 495. See letter of Sir William Scott and Sir John Nicholl to Chief Justice Jay, above cited; and *Rose* v. *Himely*, 4 Cranch, 241, 277, in which Chief Justice Marshall said: 'Those on board a vessel are supposed to represent all who are interested in it, and if placed in a situation which requires them to take notice of any proceedings against a vessel and cargo, and enables them to assert the rights of the interested, the cause is considered as being properly heard, and all concerned are parties to it.'

Even when conflicting claims of title are put in, the Prize Court will not ordinarily determine between them, unless one of the claimants is a citizen of its own country.

Thus, in a case in which an American vessel was taken by the Danes, and captured from them by an English ship of war and brought into the High Court of Admiralty as prize; the master made affidavit that he had previously sold her, under the pressure of necessity, by reason of injuries from perils of the sea, to one Ormsby, an American, from whom the Danes took her; and separate claims were presented in behalf of Ormsby and of Coit and Edwards, also Americans, who were admitted to be the original owners, and whose names appeared as such in the register and other papers of the ship,—Sir William Scott, after observing upon the circumstances attending the sale by the master, said: 'But the court is not called upon to determine upon the validity of the title, which may be matter of discussion hereafter in the American courts. It is only required to give possession.' 'The ship's register and all the papers point to Coit and Edwards as the owners of the vessel, | and p. 82
I have no hesitation in restoring the possession to them.' 'I therefore restore the possession of the vessel to the persons appearing by the register and ship's papers to be the owners, without prejudice to such rights as Mr. Ormsby, or any other persons, may have acquired by purchase, or otherwise as shall appear to the proper court of justice in America.' *The Fanny & Elmira*, Edw. Adm. 117, 120, 121.

In *The Lilla*, 2 Sprague, 177, affirmed on appeal, 2 Cliff. 169, an American vessel owned by Maxwell, a citizen and resident of Maine, was taken by a Confederate privateer and carried into Charleston, South Carolina, and there condemned and sold by a tribunal, acting under the assumed authority of the Confederate States, to persons who took her to England, where she was registered in the name of one Bushby, after which she was captured on the high seas and brought in by a United States gunboat. Claims were presented by Maxwell and by Bushby, and after hearing counsel in behalf of each claimant, as well as of the captors, the court decided against the claim of Bushby, and ordered the vessel to be restored to Maxwell, on condition of payment of salvage to the recaptors. But the opinion of Judge Sprague shows that juris-

diction over the question of title was exercised only to protect the rights of one of our own citizens against foreigners to property in the possession of the court, and that if the question of ownership were wholly between foreigners, the court might refuse to decide it. 2 Sprague, 187.

As incidental to the question of the lawfulness of the capture, prize courts have doubtless jurisdiction to determine the liability of the captors for damages, expenses, and costs, occasioned by their own wrongful acts, or by the fault of those in charge of the prize while in their custody. *Le Caux* v. *Eden*, 2 Doug. 594, 610; *The Siren*, 7 Wall. 152; 1 Kent, Com. 359. But the learning and research of counsel have failed to furnish a single case, where there was but one claimant of property libelled as prize of war, in which a prize court has undertaken to pass upon the validity of his title as against other persons, or in which its decree has been set up in a subsequent suit as an adjudication of that title as between him and them.

p. 83 All the proceedings in the case of the 'Wren' were according | to the usual practice in prize causes. The libel was filed within three days, and the monition was returnable, and the hearing upon the evidence *in preparatorio* had, within fourteen days after the capture. The only claim put in was by the master, under oath, stating positively that he was the master and as such lawful bailee of the vessel, and claimed her for the owner. The further statement in the claim that Laird, and no other person, was the true and *bona fide* owner of the vessel, was only upon information and belief, and reference to her register in the possession of the court. That register was dated at Liverpool six months before, showed Laird to have been the owner, and had at its foot a memorandum stating that by the Merchant Shipping Act 1854 (St. 17 & 18 Vict. c. 104) it was not a document of title, and did not necessarily contain notice of all changes of ownership. The court ordered further proof from certain witnesses on specified interrogatories to be taken forthwith, and, after a final hearing upon the whole evidence, announced, within twenty-two days from the filing of the libel, its decree of condemnation, which was afterwards entered in form.

The decree of this court on appeal merely reversed the decree of condemnation and directed the vessel to be restored to the claimant. The references in the argument of counsel before this court, and in its judgment delivered by Mr. Justice Nelson, to the evidence upon the question whether she was the property of Laird or of other persons, were only by way of assisting in the determination of the sole question at issue, whether she was or was not enemy's property and therefore lawful prize. *The Wren*, 6 Wall. 582. The final decree of the District Court recited the decree and mandate of this court, and in conformity therewith ordered the proceeds to be paid to Laird, the person appearing to be the owner

by the ship's papers and according to the best information and belief of the master, as stated in the claim put in by him. Neither the decree of this court nor the subsequent decree of the District Court determined, or assumed to determine, any question of title as between Laird and Prioleau or other persons who had not appeared in the cause nor contested Laird's claim.

The libellants, in this suit against Laird personally, and | against p. 84
Foster & Thompson as his garnishees, have the burden of proving that the fund in the hands of the garnishees belongs to Laird. There is nothing in the acts of Prioleau, or of the garnishees as his attorneys, which estops the garnishees to deny that fact and to put the libellants to proof of it. He had no knowledge of the prize proceedings until after the decree of condemnation. Having a title to the vessel under the bill of sale from Laird, he prosecuted the appeal from that decree in Laird's name and by Laird's authority. Whatever effect Prioleau's omission to disclose his own interest might have had, if discovered, upon the issue in the prize cause, or might have, by way of estoppel, if the present suit were brought by the United States, he has done nothing which Laird or Laird's creditors have been misled by or have acted upon. The title in the vessel, as between Laird and Prioleau, was in Prioleau. The garnishees, being attorneys both of Laird and of Prioleau, received the proceeds in the name of Laird, but for Prioleau. There being no estoppel, either of record or *in pais*, the libellants fail to prove that the fund belongs to Laird, and cannot therefore maintain their attachment.

This case does not present the question whether if Prioleau were plaintiff or actor, seeking affirmative relief against Laird or against these libellants, he must be considered as standing in such a position, by reason of his having concealed from the Prize Court his own title to the vessel, and of his having permitted restitution to be decreed to Laird, that the court would decline to assist him, upon the principle applied in *De Metton* v. *De Mello*. 12 East, 234, and 2 Camp. 420.

Decrees affirmed.

Mr. Justice Blatchford did not sit in this case, nor take any part in deciding it.

The Nuestra Señora de Regla.

(108 U.S. Reports, 92) 1882.

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE SOUTHERN DISTRICT OF NEW YORK.

Appeal—Constitutional Law—Demurrage—Execution—Prize—Probable Cause—Supreme Court.

The *Nuestra Señora de Regla* was seized in November, 1861, by the army. In December, 1861, the master chartered her to the quartermaster's department for two hundred dollars a day. She remained in the service of the quartermaster till January 29th, 1862, when she was delivered to the navy, by whom she was used as a transport till March 1, 1862. She was then sent to New York and libelled as prize. A decree of restitution was made June 20th, 1863. Proceedings to fix the amount of demurrage were stayed to enable the matter to be adjusted diplomatically. In 1870 the Department of State informed the Spanish Minister that it would be more satisfactory to the United States to have the question settled by the court. A reference to a commissioner resulted in a decree for demurrage to the date of the decree for restoration, in all 268 days. On appeal the decree was set aside as excessive, and the case remanded. Under a new reference the same demurrage was allowed, and decree therefor made: *Held* that

1. It having been settled by the former decree in 17 Wall. 29, that the steamer was not lawful prize, and that the capture was without probable cause, these questions were no longer open. *Supervisors* v. *Kennicott*, 94 U. S. 498, followed.
2. The capture being made by the army, the vessel was not subject to condemnation as prize.
3. The executive could, without legislative authority, submit to the determination of a judicial tribunal the question of the amount of damages for the capture.
4. A captor who does not institute judicial proceedings for the condemnation of his prize without unnecessary delay is subject to demurrage in case a decree of restitution is made after proceedings are begun.
5. The United States are liable to demurrage in the present case from the date when the surrender for adjudication might have been made until the date of the surrender, at the rate fixed by the charter party.

THE steamer Nuestra Señora de Regla was built in New York for the claimant, a railroad company in Cuba, created by the laws of Spain. She was delivered to an agent of the claimant on the 6th of November, 1861, and sailed for Havana in command of a Spanish master. She was a side-wheel steamer of about three hundred tons burden, built to run
p. 93 on a ferry | between Havana and a terminus of the railroad company's railroad. On her way down the coast she went into Port Royal, and while there the quarter-master of the United States at that post offered to purchase her for the use of the government. The master declined to sell, as he had no authority. She was then, on the 29th of November, seized by order of Gen. Thomas W. Sherman, in command of the United States forces. In communicating the fact of the seizure to the adjutant-general of the army, on the second of December, the general said:

'If this steamer I have seized is confiscated, she should be left here. She is just the thing we want, and admirably adapted for these waters and our purpose. She is new and exactly such a boat as they have at the Jersey City Ferry in N. Y. Will carry 1,000 men, and will draw not over six or seven feet.'

No judicial proceedings were instituted for her condemnation, but at some time before December 16th, the following charter party was entered into:

'Articles of agreement made this day of December, 1861, between , captain of the steam ferry-boat Nuestra Señora de Regla, for and on behalf of the owners of the said ferry-boat, of the first part, and Captain Rufus Saxton, as assistant quarter-master in the United States army, for and on behalf of the United States of America, of the second part, witnesseth:

'That the said party of the first part, for and in consideration of the payment hereinafter promised to be well and truly made by the said party of the second part, hath chartered to the United States the steam ferry-boat Nuestra Señora de Regla, with all her tackle, apparel, furniture, and machinery, to be used for transporting troops, stores, or other things, as the said party of the second part may direct.

'And the said party of the second part doth agree, for and in consideration of the faithful performance of the above duty, that the said party of the first part shall receive the sum of two hundred dollars for each and every day the said boat may be kept in service, said steam ferry-boat to be kept staunch, sound and strong, | and her machinery in p. 94
good running order and condition, by the party of the first part.

'It is understood by the parties to this agreement that in case the said steam ferry-boat shall be confiscated to the United States, then this contract shall be void; otherwise to remain in full force and virtue.

'It is furthermore understood by the parties to this agreement that the said steam ferry-boat is not to be run outside of the bar of Port Royal, but at any and all points on the rivers and creeks that connect with Broad River.

'This contract to commence on the 16th day of December, 1861, and continue in force ten days, after which each party has a right to cancel the same.

'In witness whereof the undersigned have hereunto affixed their hands and seals, at Hilton Head, S. C., the day and date first above written.

'(S'd) YGNACIO A. REYNALS. [L. S.]
'(S'd) R. SAXTON, [L. S.]
'*Capt. U. S. Army, Chief Quartermaster, E. C.*'

The testimony showed that two hundred dollars a day was a fair price for the use of the vessel at that place at that time. One witness, competent to judge, testified to that effect, and no attempt was made by the United States to contradict him.

The vessel was kept in the possession or under the control of the quarter-master until the 29th of January, when she was in form delivered

to the flag officer of the navy in command at that station. She was, however, kept in constant use by the government as a transport, in the way contemplated by the charter, from the 16th of December until about the 1st of March, when she was sent to New York. No judicial proceedings were begun against her until the 9th of June, when a libel of information in prize was filed in the District Court for the Southern District of New York by the United States, in behalf of themselves 'and of the naval captors in interest.' She was attached on the same day by the marshal, and the usual monition was issued and served. The owner filed a claim on the 9th of July. No further proceedings were had until the 22d of August, when the following order was entered : |

p. 95 'On reading and filing a notice of motion and a verified copy of a letter from the secretary of the navy, stating that the navy department desires to obtain possession of the steamer Nuestra Señora de Regla ; and on hearing Mr. E. Delafield Smith, United States district attorney, in support of the motion, and Mr. W. R. Beebe, proctor for the claimants, in opposition thereto, it is hereby ordered that the said steamer Nuestra Señora de Regla be appraised by Benjamin F. Delano, United States naval constructor, and Benjamin F. Garvin, chief engineer, both now stationed at the navy yard, New York, and John Inglis ; that such appraisement be filed with all convenient speed with the clerk of this court ; that thereafter said steamer be delivered to the navy department for the use of the government, upon filing in court a certificate of the assistant treasurer of the United States in New York that the amount of the appraisement has been deposited in the United States treasury, subject to the order and disposal of the court on final decree in the case.

'SAMUEL R. BETTS.'

The letter of the secretary of the navy referred to in this order was as follows :

'NAVY DEPARTMENT, *August 11th*, 1862.

'SIR : The department will take the steamer Nuestra Señora de Regla at the appraisement of twenty-five thousand dollars.

'It desires early information, if practicable, as to the appraisement in the case of the Annie, the Stettin, and the Memphis.

'I am, resp'y, your ob't s'v't, 'GIDEON WELLS.'

The vessel was valued by two of the appraisers at $28,000 and by the third at $30,000, and immediately delivered to the navy department, although the certificate of deposit provided for was never filed. The cause was heard on the 20th June, 1863, and a decree entered directing that the vessel be restored to the owner, but reserving all questions of costs, and damages resulting from the capture, for future hearing and determination. On the 15th of October, 1863, the following entry was made in the cause :

p. 96 'It having been mutually agreed between the counsel for the | respective parties that the said vessel, in the above decision, was immediately

taken into the possession and use of the United States under a charter-party, and delivered them thereunder, and so remained without molestation from the claimants. On motion of the counsel for the vessel and with the assent of the United States attorney, it is ordered by the court that further proceedings and litigation be stayed in the above cause, to the end that all questions of damages reserved in the decision of the court in the term of June last, may be considered and adjusted by the government of the United States in the application, and with the concurrence of the government of Spain.

'SAMUEL R. BETTS.'

On the 20th of May, 1870, the following letter was addressed to the Spanish minister in Washington by the Acting Secretary of State:

'DEPARTMENT OF STATE, *Washington, May 20th*, 1870.

'SIR: I have the honor to acknowledge the receipt of your note of the 5th instant in relation to the Spanish steamer Nuestra Señora de Regla, and the claim which arose in consequence of her seizure by the United States authorities in 1861.

'The District Court of the United States for the Southern District of New York, after deciding that the claimants were entitled to restitution of the vessel, made an order suspending proceedings, to the end that the question of damages might be considered and adjusted by the government on the application and with the concurrence of that of Spain.

'Without referring to the reasons which have so long delayed any arrangement between the two governments, I have now to say that it will be more satisfactory to the government that the parties interested should apply to the court, which still retains jurisdiction of the case, to obtain such further relief as justice may demand, and in the mode which that tribunal shall deem most proper and convenient.

'I avail myself of this occasion to offer to you assurances of my very high consideration.

'J. C. BANCROFT DAVIS,
'*Acting Secretary of State.*'

On the 2d of June following, the cause was referred to one of the p. 97
commissioners of the court to ascertain the amount of damages the claimant had sustained by the seizure and detention of the vessel. The commissioner made his report on the 20th of May, 1871, fixing the damages for the detention at the rate of $200 a day from November 29th, 1861, to June 20th, 1863, the date of the decree for restoration, with interest at six per cent. per annum, amounting to $167,370.66⅔, and allowing for the expenses and services of an agent remaining with and attending to the vessel, $5,680; for counsel fee in defending the proceedings, $5,000, and for the value of the vessel at the date she should have been restored, with interest added, $36,833.33⅓, or a total of $214,884.00. Exceptions were taken to this report by the United States, but they were overruled, and a decree rendered for the full amount allowed by the master, with interest added.

From that decree an appeal was taken to this court, where, at the

October term, 1872, it was decided ' that the vessel was not lawful prize of war or subject to capture, and the corporation which owned her is doubtless entitled to fair indemnity for the losses sustained by the seizure and employment of the vessel ; but it may be well doubted whether it is not more properly a subject of diplomatic adjustment than determination by the courts.' It was also said in the opinion, ' the decree of the district court included the sum of $5,000 for counsel fees. We think that the amount was greatly excessive, and the allowance for counsel fees wholly unwarranted.' For the errors thus indicated the decree was reversed. *The Nuestra Señora de Regla*, 17 Wall. 29. The case was then remanded for further proceedings in accordance with the opinion. On the 22d of July, 1873, after the mandate was filed, a second reference was made to the commissioner ' to assess the damages of the claimant of the vessel sustained by him in consequence of the seizure and detention of the vessel, and that on such reference all the proofs already taken in the cause or before the referee be used, together with such other proofs as may be put in by either party.'

Under this reference the commissioner again reported that the United
p. 98 States continued to use the vessel after she was taken | possession of by the navy department, pursuant to the order of August 22d, 1862, until the 20th of June, 1863, the date of the decree for her restoration, and that she had never been restored to the owners or her value paid. He therefore allowed :

For detention from November 29th, 1861, to June 20th, 1863, 568 days, at $200 per day	$113,600 00
Interest at 6 per cent. to date of report	81,698 00
For value of vessel, ascertained to be	30,000 00
Interest from June 20th, 1863	21,549 00
For expenses of agent, 568 days at $10	5,680 00
	$252,527 00

To this report exceptions were filed on behalf of the United States, but they were overruled by the court, and a decree entered March 8th, 1879, for the amount found due, with interest from the date of the report, or in all, $308,932.38. From that decree this appeal was taken.

Mr. Assistant Attorney-General Maury for the United States :—
I. Argued the merits of the seizure on the facts as now presented, and contended, on the authority of *United States* v. *Bank of the United States*, 5 How. 382, that the court was not concluded in the second appeal by an expression of opinion on the first appeal as to a question which was not then presented in the then condition of the record ; and further that the government cannot be prejudiced by the laches of its officers in omitting to properly present the question of the validity of the seizure at the

former trial.—II. The record shows the seizure was made for probable cause, as defined in *The Thompson*, 3 Wall. 155; *Locke* v. *United States*, 7 Cranch, 339.—III. The proper parties to a judgment are not before the court. The persons who used the authority of the government to seize the vessel should be here in a proceeding in prize. *The Louisa Agnes*, Blatchford Prize Cases, 107; *The Eleanor*, 2 Wheat. 345; *The Magnus*, 1 C. Rob. 31. Especially if a judgment for costs is to be given against them. *The Leucade*, | 2 Spinks. 228. The soldiers who made the seizure p. 99
have no interest in the prize as captors, *The Siren*, 13 Wall. 389; but may nevertheless be subjected in a prize court to damages and costs for the seizure. *Ib.*—IV. The court below was without authority to make a decree against the United States. *Case* v. *Terrell*, 11 Wall. 199.—V. The demurrage was not referrible to the capture as proximate cause, and was therefore not ground for damages in this suit.—VI. The use of the vessel under the charter-party was under a contract, and therefore not a ground for judgment for damages.—VII. No damages should in any event have been allowed after August, 1862.

Mr. William Allen Butler for the appellee.—I. The questions settled at the former hearing are no longer open. *Himely* v. *Rose*, 5 Cranch, 313; *Skillern* v. *May*, 6 Cranch, 267; *Ex parte Sibbald* v. *United States*, 12 Pet. 488; *The Santa Maria*, 10 Wheat. 431; *Corning* v. *Troy Iron and Nail Factory*, 15 How. 451; *Supervisors* v. *Kennicott*, 94 U. S. 498; *The Lady Pike*, 96 U. S. 461.—II. The district court had power to make all orders and decrees made in the case. *The Apollon*, 9 Wheat. 362; *The Lively*, 1 Gallison, 314; *The Glen*, Blatchford Prize Cases, 375; *The Sybil*, Blatchford Prize Cases, 615; *The Siren*, 7 Wall. 152; *The Labuan*, Blatchford Prize Cases, 165; *The Jane Campbell*, Blatchford Prize Cases, 101.—III. The United States having waived objection to jurisdiction, the adjudication is final. The exercise of a jurisdiction which exists cannot be objected to after voluntary appearance and litigation on the merits. *Rhode Island* v. *Massachusetts*, 12 Pet. 657; *Bangs* v. *Duckinfield*, 18 N. Y. 592. A State properly brought into the forum of litigation cannot assert rights or immunities as incident to sovereignty. *Davis* v. *Gray*, 16 Wall. 203.—IV. The United States is not sued in these proceedings. It comes into court voluntarily, and forces the vessel here. That has no analogy to a proceeding against the United States as defendants. There are plenty of precedents to support the decree. *The Labuan* and *The Sybil*, *ubi sup.*—V. There was no error in respect to the award of damages. On this point *Mr. Butler* referred to the Treaty of 1795, 8 | Stat. 139, as showing the obligation and rights of the parties, and p. 100
cited Roberts on Admiralty and Prize, 446; Upton on Prize Courts, 246; Phill. Int. Law, § 449; *The Lively*, 1 Gallis. 314; *The Apollon*, 9 Wheat. 377; *The Pizarro*, 2 Wheat. 227; Massé, Droit Commercial, liv. ii., ch. 2,

§ 2 ; § xi. tom. 1, p. 310 ; 3 Phill. Int. Law, 41 ; Wheat. Int. Law (Lawrence ed.), 512 ; *Haver* v. *Yaker*, 9 Wall. 32. The rule of damages is to measure the compensation by the freight which the vessel was in the act of earning. *Williamson* v. *Barrett*, 13 How. 101 ; *The Gazelle*, 2 W. Rob. 279 ; *The Glaucus*, 1 Lowell, 366 ; *Vantine* v. *The Lake*, 2 Wall. Jr. 52 ; *The Narragansett*, Olcott, 388 ; *The Rhode Island*, Olcott, 505 ; *The M. M. Caleb*, 10 Blatchford, 467 ; *The Stromless*, 1 Lowell, 153 ; *Whitehall Trans. Co.* v. *N. J. Steamboat Co.*, 51 N. Y. 369 ; *Mailler* v. *Express Propeller Line*, 61 N. Y. 312. Under the circumstances complete indemnity can be given only by compensation for the loss of earnings as well as the loss of the vessel. *Allen* v. *Fox*, 51 N. Y. 562 ; *Star of India*, 1 Prob. Div. 466 ; *Dermott* v. *Jones*, 2 Wall. 1 ; *Sturgis* v. *N. J. Steamboat Co.*, 35 N. Y. Superior Ct. Rep. 251 ; *S. C.* on appeal, 62 N. Y. 625 ; *Howland* v. *Coffin*, 47 Barb. 653. For the parallel rule at common law, see *Hadley* v. *Baxendale*, 9 Exch. 341 ; *Phil., Wilm. & Balt. R. R. Co.* v. *Howard*, 13 How. 307. And the order of the prize court of Aug. 22d, 1862, for the delivery of the vessel to the navy department, does not affect the right of the claimant to the whole award for demurrage up to the time of final decree. *The Memphis*, Blatchford Prize Cases, 202 ; *The Ella Warley*, Ib. 207 ; *Hudson* v. *Guestier*, 4 Cranch, 293 ; *Home* v. *Camden*, 2 H. Bl. 532, and 4 T. R. 383 ; *Willis* v. *Commissioners of Prize*, 5 East, 22 ; *The Noysomhed*, 7 Ves. Jr. 593 ; *The Brig Louis*, 5 C. Rob. 146 ; *The Two Friends*, 1 C. Rob. 271 ; *The Eliza*, 1 Acton, 336 ; *Smart* v. *Wolffe*, 3 T. R. 323 ; *The Pomona*, 1 Dodson, 25 ; *The Peterhoff*, Blatchf. Prize Cases, 620 ; *Le Caux* v. *Eden*, 2 Doug. 594, 610, 616 ; *Goss* v. *Withers*, 2 Burr. 683, 694 ; *The Flad Oyen*, 1 C. Rob. 134 ; *The Santa Cruz*, 1 C. Rob. 49 ; *The Fanny and Elmira*, 1 Edw. Adm. 117 ; *The Ceylon*, 1 Dodson, 105. |

p. 101 Mr. Chief Justice Waite delivered the opinion of the court. After reciting the facts as above stated he continued :

That the steamer was not lawful prize or the subject of capture was expressly decided on the former appeal. It was also impliedly settled that the capture was without probable cause, for it was said that the owner was undoubtedly entitled to a fair indemnity for the losses sustained, the only difficulty being as to the amount. These questions are, therefore, no longer open. *Clark* v. *Keith*, 106 U. S. 464 ; *Supervisors* v. *Kennicott*, 94 U. S. 499.

The first of the remaining questions to be considered is whether a decree can be entered against the United States for damages. As the capture was made by the army, or by the army and navy operating together, it inured exclusively to the benefit of the United States. There is no distribution of prize money in such a case. *Porter* v. *United States*, 106 U. S. 607 ; *The Siren*, 13 Wall. 389. The United States were, there-

fore, in legal effect the captors, and they came voluntarily into court to secure for themselves the benefit of what had been done. They deliberately adopted the acts of the military and naval officers as their own, and came, as captors, to condemn their prize. Offers to purchase the vessel were made and declined before she was seized, and soon after the seizure she was chartered and put into actual use without any attempt at securing an adjudication. It is evident, also, that the capture must have been the subject of diplomatic correspondence between the government of Spain and the United States before the vessel was brought in for adjudication, because on the 6th of May, 1862, after the vessel got to New York, and before the libel was filed, Mr. Seward, the then secretary of State, wrote the district attorney for the Southern District of New York, as follows :

'SIR : Noticing the arrival at New York of the Spanish steamer Nuestra Señora de la Regla, which was seized at Port Royal by General Sherman for an alleged illegal breach of neutrality, I now transmit the papers found on board of her, and an abstract of them which I caused to be prepared and which you may find useful.' |

Although the libel was filed on the 9th of June, 1862, and the claim p. 102
was promptly put in, the adjudication was not had until June of the following year, when all further proceedings were stayed with the consent of both parties to await an adjustment of damages by the two governments. Nothing further was done until nearly seven years afterwards, when the secretary of State informed the Spanish government of the wish of the United States that the parties interested should apply to the court, which still retained jurisdiction, for such relief as justice demanded, and in the mode that tribunal should deem most proper and convenient. Thereupon, on motion of the claimant, and with the consent of the United States district attorney, the reference was ordered to ascertain the damages. Under these circumstances we cannot but think the United States have voluntarily submitted themselves to the court at the instance of the Spanish government, and with the consent of the claimant, for the purpose of having the questions of damages growing out of the capture judicially settled according to the rules applicable to private persons in like cases.

It is objected, however, that the executive department of the government had no power, in the absence of express legislative authority, to make such a submission. It was the duty of the United States, under the law of nations, to bring all captured vessels into a prize court for adjudication. If that had not been done in this instance, the Spanish government would have had just cause of complaint, and could have demanded reparation for the wrongs that had been done one of its subjects. The executive department had the right to bring the suit. In that suit it had been determined that the capture was unlawful. Necessarily, therefore, the question of damages to the owner of the

captured vessel arose. Since, without the consent of the United States, no judgment for damages could be rendered against them in the pending suit that could be enforced by execution, the Spanish government had the right to assume the prosecution of the claim, and it did. Necessarily the negotiations on the part of the United States under this claim were conducted by the executive. After long delay no agreement was reached,
p. 103 and as a last resort for ending the controversy, it | was determined to refer the whole matter to the court for judicial inquiry and determination. We see no reason why this might not be done in such a case. It is true any judgment that may be rendered cannot be judicially enforced, but the questions to be settled are judicial in their character, and are incidents to the suit which the United States were required to bring to enforce their rights as captors. It is too late now to insist that the case is not one of prize, because in the libel it is expressly alleged that the vessel was captured as lawful prize, and condemnation was asked on that account. When, therefore, the United States, through the executive of the nation, waived their right to exemption from suit, and asked the prize court to complete the adjudication of a cause which was rightfully begun in that jurisdiction, we think the government is bound by the submission, and that it is the duty of the court to proceed to the final determination of all the questions legitimately involved.

The next inquiry is as to the amount of damages. The duty of a captor is to institute judicial proceedings for the condemnation of his prize without unnecessary delay, and if he fails in this the court may, in case of restitution, decree demurrage against him as damages. This rule is well settled. *Slocum* v. *Mayberry*, 2 Wheat. 1 ; *The Apollon*, 9 Wheat. 362 ; *The Lively*, 1 Gall. 314 ; *The Corier Maritimo*, 1 Rob. 287.

Upon the facts in this case there can be no doubt of the propriety of such an allowance for the extraordinary detention of the vessel before she was delivered up for adjudication, especially since she was detained for the express purpose of use by the United States. And as to the amount of the allowance, there is no opportunity for discussion. The United States were willing and actually contracted to pay $200 a day for her use if she was not in fact lawful prize, and that is shown to have been a reasonable price for her charter at the time. She was seized on the 29th of November, and it is fair to assume that if due diligence had been used she might have been surrendered for adjudication by the 16th of December, when her charter began to run. She was not actually surrendered until the
p. 104 9th of June—a delay of 175 days beyond what was necessary. It | is not disputed that her value at that time was $30,000. She cost when built $50,000, and was new when captured. As she has never been restored under the order to that effect, there can be no doubt of the liability of the United States for her value, when at their request she was delivered into

their possession by the court. It is not a matter of any importance that the certificate of deposit in the treasury of the amount of her appraised value was not filed. By taking the vessel on the terms imposed by the court, the United States impliedly agreed to restore her in as good condition as she was when taken, or pay her value in money. By the surrender of the vessel for adjudication, the United States relieved themselves from any further liability for damages in the way of demurrage, and became bound for the vessel instead.

The allowance for demurrage includes reasonable compensation for the pay and expenses of an agent to look after the interests of the owners up to the time of the delivery of the vessel to the navy department by the court. After that no agent was necessary. From that time the case stood as though a sale had been made and the proceeds paid into the registry of the court.

Our conclusion is that damages should be allowed as follows:

For unnecessary and unusual delay in proceeding to adjudication, 175 days at $200	$35,000
For value of vessel	30,000
In all	$65,000

To which add interest, at the rate of six per cent. per annum, from the time of the order of restitution, June 20th, 1863, until the decree.

The decree of the district court is reversed and the cause remanded with instructions to enter another decree in accordance with this opinion.

The Olinde Rodrigues.

(174 U.S. Reports, 510) 1899.

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE DISTRICT OF SOUTH CAROLINA.

No. 704. Argued April 11, 13, 1899.—Decided May 15, 1899.

A blockade to be binding must be known to exist.

There is no rule of law determining that the presence of a particular force is necessary in order to render a blockade effective, but, on the contrary, the test is whether it is practically effective, and that is a mixed question, more of fact than of law.

While it is not practicable to define what degree of danger shall constitute a test of the efficiency of a blockade, it is enough if the danger is real and apparent.

An effective blockade is one which makes it dangerous for vessels to attempt to enter the blockaded port; and the question of effectiveness is not controlled by the number of the blockading forces, but one modern cruiser is enough as matter of law, if it is sufficient in fact for the purpose, and renders it dangerous for other craft to enter the port.

The blockade in this case was practically effective, and, until it should be raised by an actual driving away by the enemy, it was not open to a neutral trader to ask whether, as against a possible superiority of the enemy's fleet, it was or was not effective in a military sense.

After the captors had put in their proofs, the claimant, without introducing anything further, moved for the discharge and restitution of the steamship, on the ground of the ineffective character of the blockade and because the evidence did not justify a decree of condemnation; and in addition claimed the right
p. 511 to adduce further proofs, if its motion | should be denied. *Held*, that the settled practice of prize courts forbids the taking of further proof under such circumstances.

The entire record in this case being considered, the court is of opinion that restitution of the Olinde Rodrigues should be awarded, without damages, and that payment of the costs and expenses incident to her custody and preservation, and of all costs in the cause, except the fees of counsel, should be imposed upon the ship.

THIS was a libel filed by the United States against the steamship Olinde Rodrigues and cargo in the District Court for South Carolina, in a prize cause, for violation of the blockade of San Juan, Porto Rico. The steamship was owned and claimed by La Compagnie Générale Transatlantique, a French corporation.

The Olinde Rodrigues left Havre, June 16, 1898, upon a regular voyage on a West Indian itinerary prescribed by the terms of her postal subvention from the French government. Her regular course, after touching at Paulliac, France, was St. Thomas, San Juan, Port au Platte or Puerto Plata, Cape Haytien, St. Marque, Port au Prince, Gonaives, and to return by the same ports, the voyage terminating at Havre. The proclamation of the President declaring San Juan in a state of blockade was issued June 27, 1898. The Olinde Rodrigues left Paulliac June 19, and arrived at St. Thomas July 3, 1898, and on July 4, in the morning, went into San Juan, Porto Rico. She was seen by the United States auxiliary cruiser Yosemite, then blockading the port of San Juan.

On the fifth of July, 1898, the Olinde Rodrigues came out of the port of San Juan, was signalled by the Yosemite, and on communicating with the latter asserted that she had no knowledge of the blockade of San Juan. Thereupon a boarding officer of the Yosemite entered in the log of the Olinde Rodrigues an official warning of the blockade, and she went on her way to Puerto Plata and other ports of San Domingo and Haiti. She left Puerto Plata on her return from these ports, July 16, 1898, and on the morning of July 17 was captured by the United States armored cruiser New Orleans, then blockading the port of San Juan, as attempting to enter that port. A prize crew was put on board and
p. 512 the vessel was | taken to Charleston, South Carolina, where she was libelled as before stated, July 22, 1898. Depositions of officers, crew and persons on board the steamship were taken by the prize commissioners *in preparatorio*, in answer to certain standing interrogatories, and the papers and documents found on board were put in evidence. Depositions of officers and men from the cruiser New Orleans were also taken *de bene esse*, but were not considered on the preliminary hearing except on a motion by the District Attorney for leave to take further proofs.

The cause having been heard on the evidence *in preparatorio*, the District Judge ruled, August 13, for reasons given, that the Olinde Rodrigues could not, under the evidence as it stood, be condemned for her entry into the blockaded port of San Juan on July 4, and her departure therefrom July 5, 1898; nor for attempting to enter the same port on July 17; but that the depositions *de bene esse* justified an order allowing further proofs, and stated also that an order might be entered, 'discharging the vessel upon stipulation for her value, should the claimant so elect.' 89 Fed. Rep. 105. An order was accordingly entered that the captors have ninety days to supply further proof 'as to the entry of the "Olinde Rodrigues" into the port of San Juan, Porto Rico, on July 4, 1898, and as to the courses and movements of said vessel on July 17, 1898;' and 'that the claimants may thereafter have such time to offer testimony in reply as may seem proper to the court.'

The cargo was released without bond, and on September 16 the court entered an order releasing the vessel on 'claimants giving bond by the Compagnie Générale Transatlantique, its owners, without sureties, in the sum of $125,000 conditioned for the payment of $125,000 upon the order of the court in the event that the vessel should be condemned.' The bond was not given, and the vessel remained in custody.

Evidence was taken on behalf of the United States, and the cause came on for hearing on a motion by the claimants for the discharge and restitution of the steamship on the grounds: (1) That the blockade of San Juan at the time of the capture of the Olinde Rodrigues was not an effective | blockade; (2) That the Olinde Rodrigues was not violating p. 513
the blockade when seized.

The District Court rendered an opinion December 13, 1898, holding that the blockade of San Juan was not an effective blockade, and entered a decree ordering the restitution of the ship to the claimants. 91 Fed. Rep. 274. From this decree the United States appealed to this court and assigned errors to the effect: (1) That the court erred in holding that there was no effective blockade of the port of San Juan on July 17, 1898; (2) That the court erred in not finding that the Olinde Rodrigues was captured while she was violating the blockade of San Juan, July 17, 1898, and in not decreeing her condemnation as lawful prize.

Mr. J. P. K. Bryan and *Mr. Assistant Attorney General Hoyt* for appellant.

Mr. Edward K. Jones for appellee.

Mr. Chief Justice Fuller, after making the above statement, delivered the opinion of the court.

We are unable to concur with the learned District Judge in the conclusion that the blockade of the port of San Juan at the time this steamship was captured was not an effective blockade.

To be binding, the blockade must be known, and the blockading force must be present; but is there any rule of law determining that the presence of a particular force is essential in order to render a blockade effective? We do not think so, but on the contrary, that the test is whether the blockade is practically effective, and that that is a question, though a mixed one, more of fact than of law.

The fourth maxim of the Declaration of Paris, (April 16, 1856,) was: 'Blockades, in order to be binding, must be effective, that is to say, maintained by a force sufficient really to prevent access to the coast of the enemy.' Manifestly this broad definition was not intended to be
p. 514 literally applied. | The object was to correct the abuse, in the early part of the century, of paper blockades, where extensive coasts were put under blockade by proclamation, without the presence of any force, or an inadequate force; and the question of what might be sufficient force was necessarily left to be determined according to the particular circumstances.

This was put by Lord Russell in his note to Mr. Mason of February 10, 1861, thus: 'The Declaration of Paris was in truth directed against what were once termed "paper blockades;" that is, blockades not sustained by any actual force, or sustained by a notoriously inadequate naval force, such as an occasional appearance of a man-of-war in the offing or the like. . . . The interpretation, therefore, placed by Her Majesty's government on the Declaration was, that a blockade, in order to be respected by neutrals, must be practically effective. . . . It is proper to add, that the same view of the meaning and effect of the articles of the Declaration of Paris, on the subject of blockades, which is above explained, was taken by the representative of the United States at the Court of St. James (Mr. Dallas) during the communications which passed between the two governments some years before the present war, with a view to the accession of the United States to that Declaration.' Hall's Int. Law, § 260, p. 730, note.

The quotations from the Parliamentary debates, of May, 1861, given by Mr. Dana in note 233 to the eighth edition of Wheaton on International Law, afford interesting illustrations of what was considered the measure of effectiveness; and an extract is also there given from a note of the Department of Foreign Affairs of France of September, 1861, in which that is defined: 'Forces sufficient to prevent the ports being approached without exposure to a certain danger.'

In *The Mercurius*, 1 C. Rob. 80, 84, Sir William Scott stated: 'It is said, this passage to the Zuyder Zee was not in a state of blockade; but the ship was seized immediately on entering it; and I know not what else is necessary to constitute blockade. The powers who formed the armed neutrality in the last war, understood blockade in this sense;

and | Russia, who was the principal party in that confederacy, described p. 515
a place to be in a state of blockade, when it is dangerous to attempt to enter into it.'

And in *The Frederick Molke*, 1 C. Rob. 86, the same great jurist said: 'For that a legal blockade did exist, results necessarily from these facts, as nothing farther is necessary to constitute blockade, than that there should be a force stationed to prevent communication, and a due notice, or prohibition given to the party.'

Such is the settled doctrine of the English and American courts and publicists, and it is embodied in the second of the instructions issued by the Secretary of the Navy, June 20, 1898, General Order No. 492: 'A blockade to be effective and binding must be maintained by a force sufficient to render ingress to or egress from the port dangerous.'

Clearly, however, it is not practicable to define what degree of danger shall constitute a test of the efficiency and validity of a blockade. It is enough if the danger is real and apparent.

In *The Franciska*, 2 Spinks, 128, Dr. Lushington, in passing on the question whether the blockade imposed on the port of Riga was an effective blockade, said: 'What, then, is an efficient blockade, and how has it been defined, if, indeed, the term "definition" can be applied to such a subject? The one definition mentioned is, that egress or entrance shall be attended with evident danger; another, that of Chancellor Kent, (1 Kent's Com. 146,) is, that it shall be apparently dangerous. All these definitions are and must be, from the nature of blockades, loose and uncertain; the maintenance of a blockade must always be a question of degree,—of the degree of danger attending ships going into or leaving a blockaded port. Nothing is further from my intention, nor, indeed, more opposed to my notions of the Law of Nations, than any relaxation of the rule that a blockade must be efficiently maintained; but it is perfectly obvious that no force could bar the entrance to absolute certainty; that vessels may get in and get out during the night, or fogs, or violent winds, or occasional absence; that it is most difficult to judge from numbers alone.' |

'It is impossible,' says Mr. Hall, (§ 260,) 'to fix with any accuracy p. 516
the amount of danger in entry which is necessary to preserve the validity of a blockade. It is for the prize courts of the belligerent to decide whether in a given instance a vessel captured for its breach had reason to suppose it to be non-existent; or for the neutral government to examine, on the particular facts, whether it is proper to withhold or to withdraw recognition.'

In *The Hoffnung*, 6 C. Rob. 112, 117, Sir William Scott said: 'When a squadron is driven off by accidents of weather, which must have entered into the contemplation of the belligerent imposing the blockade, there

is no reason to suppose that such a circumstance would create a change of system, since it could not be expected that any blockade would continue many months, without being liable to such temporary interruptions. But when a squadron is driven off by a superior force, a new course of events arises, which may tend to a very different disposition of the blockading force, and which introduces therefore a very different train of presumptions, in favor of the ordinary freedom of commercial speculations. In such a case the neutral merchant is not bound to foresee or to conjecture that the blockade will be resumed.' And undoubtedly a blockade may be so inadequate, or the negligence of the belligerent in maintaining it may be of such a character, as to excuse neutral vessels from the penalties for its violation. Thus in the case of an alleged breach of the blockade of the island of Martinique, which had been carried on by a number of vessels on the different stations, so communicating with each other as to be able to intercept all vessels attempting to enter the ports of the island, it was held that their withdrawal was a neglect which 'necessarily led neutral vessels to believe these ports might be entered without incurring any risk.' *The Nancy*, 1 Acton, 57, 59.

But it cannot be that a vessel actually captured in attempting to enter a blockaded port, after warning entered on her log by a cruiser off that port only a few days before, could dispute the efficiency of the force to which she was subjected.

p. 517 As we hold that an effective blockade is a blockade so effective | as to make it dangerous in fact for vessels to attempt to enter the blockaded port, it follows that the question of effectiveness is not controlled by the number of the blockading force. In other words, the position cannot be maintained that one modern cruiser though sufficient in fact is not sufficient as matter of law.

Even as long ago as 1809, in *The Nancy*, 1 Acton, 63, where the station of the vessel was sometimes off the port of Trinity and, at others, off another port more than seven miles distant, it was ruled that: 'Under particular circumstances a single vessel may be adequate to maintain the blockade of one port and coöperate with other vessels at the same time in the blockade of another neighboring port;' although there Sir William Grant relied on the opinion of the commander on that station that the force was completely adequate to the service required to be performed.

The ruling of Dr. Lushington in *The Franciska*, above cited, was to that effect, and the text books refer to other instances.

The learned District Judge, in his opinion, refers to the treaty between France and Denmark of 1742, which provided that the entrance to a blockaded port should be closed by at least two vessels or a battery on shore; to the treaty of 1760 between Holland and the Two Sicilies prescribing that at least six ships of war should be ranged at a distance

slightly greater than gunshot from the entrance; and to the treaty between Prussia and Denmark of 1818, which stipulated that two vessels should be stationed before every blockaded port; but we do not think these particular agreements of special importance here, and, indeed, Ortolan, by whom they are cited, says that such stipulations cannot create a positive rule in all cases even between the parties, 'since the number of vessels necessary to a complete investment depends evidently on the nature of the place blockaded.' 2 Ortolan, (4th ed.) 330, and note 2.

Nor do we regard Sir William Scott's judgment in *The Arthur*, (1814) 1 Dodson, 423, 425, as of weight in favor of claimants. In effect the ruling sustained the validity of the maintenance of blockade by a single ship, and the case was thus stated: 'This is a claim made by one of His Majesty's | ships to share as joint-captor in a prize taken in the river p. 518
Ems by another ship belonging to His Majesty, for a breach of the blockade imposed by the order in council of the 26th of April, 1809. This order was, among others, issued in the way of retaliation for the measures which had been previously adopted by the French government against the commerce of this country. The blockade imposed by it is applicable to a very great extent of coast, and was never intended to be maintained according to the usual and regular mode of enforcing blockades, by stationing a number of ships, and forming as it were an arch of circumvallation around the mouth of the prohibited port. There, if the arch fails in any one part, the blockade itself fails altogether; but this species of blockade, which has arisen out of the violent and unjust conduct of the enemy, was maintained by a ship stationed anywhere in the neighborhood of the coast, or, as in this case, in the river itself, observing and preventing every vessel that might endeavor to effect a passage up or down the river.'

Blockades are maritime blockades, or blockades by sea and land; and they may be either military or commercial, or may partake of the nature of both. The question of effectiveness must necessarily depend on the circumstances. We agree that the fact of a single capture is not decisive of the effectiveness of a blockade, but the case made on this record does not rest on that ground.

We are of opinion that if a single modern cruiser blockading a port renders it in fact dangerous for other craft to enter the port, that is sufficient, since thereby the blockade is made practically effective.

What then were the facts as to the effectiveness of the blockade in the case before us?

In the proclamation of June 27, 1898, occurs this paragraph: 'The United States of America has instituted and will maintain an effective blockade of all the ports on the south coast of Cuba, from Cape Frances

to Cape Cruz, inclusive, and also of the port of San Juan, in the island of Porto Rico.' (Proclamation No. 11, 30 Stat. 34.) The blockade thus
p. 519 announced was not of the coast of Porto Rico, but of the port | of San Juan, a town of less than 25,000 inhabitants, on the northern coast of Porto Rico, with a single entrance. From June 27 to July 14, 1898, the Yosemite, a merchant ship converted into an auxiliary cruiser, blockaded the port. Her maximum speed was fifteen and one half knots; and her armament ten 5-inch rapid firing guns, six 6-pounders, two 1-pounders, with greatest range of three and one half miles. While the Yosemite was blockading the port she ran the armed transport Antonio Lopez aground six miles from San Juan; gave a number of neutral vessels official notice of the blockade; warned off many from the port; and on the 5th of July, 1898, wrote into the log of the Olinde Rodrigues, off San Juan, the official warning of the blockade of San Juan. On July 14 and thereafter the port was blockaded by the armored cruiser New Orleans, whose maximum speed was twenty-two knots, and her armament six 6-inch breech-loading rifles, four 4·7-inch breech-loading rifles, ten 6-pounders, four 1·5-inch guns, corresponding to 3-pounders; four 3-pounders in the tops; four 37-millimetre automatic guns, corresponding to 1-pounders. The range of her guns was five and one half sea miles or six and a quarter statute miles. If stationary, she could command a circle of thirteen miles in diameter; if moving, at maximum speed, she could cover in five minutes any point on a circle of seventeen miles diameter; and in ten minutes any point on a circle of nineteen miles diameter; her electric search lights could sweep the sea by night for ten miles distance; her motive power made her independent of winds and currents; in these respects and in her armament and increased range of guns she so far surpassed in effectiveness the old-time war ships that it would be inadmissible to hold that even if a century ago more than one ship was believed to be required for an effective blockade, therefore this cruiser was not sufficient to blockade this port.

Assuming that the Olinde Rodrigues attempted to enter San Juan, July 17, there can be no question that it was dangerous for her to do so, as the result itself demonstrated. She had had actual warning twelve days before; no reason existed for the supposition that the blockade
p. 520 had been pretermitted or relaxed; | her commander had no right to experiment as to the practical effectiveness of the blockade, and, if he did so, he took the risk; he was believed to be making the attempt, and was immediately captured. In these circumstances the vessel cannot be permitted to plead that the blockade was not legally effective.

After the argument on the motion to discharge the vessel, application was made by counsel for the claimant to the District Judge, by letter, that the Navy Department be requested to furnish the court with all

letters or dispatches of the commanders of vessels blockading the port of San Juan in respect to the sufficiency of the force. And a motion was made in this court 'for an order authorizing the introduction into the record of the dispatches of Captain Sigsbee and Commander Davis,' dated June 27, 1898, and July 26, 1898, and published by the Navy Department in the 'Appendix to the Report of the Chief of the Bureau of Navigation, 1898,' pp. 224, 225, 642.'

To this the United States objected on the grounds that isolated statements transmitting official information to superior officers, and consisting largely of opinion and hearsay, were not competent evidence; that the claimants had been afforded the opportunity to offer additional proof, and had not availed themselves thereof; that if the court desired to have these papers before it, then the Government should be permitted to define their meaning by counter proofs; and certain explanatory affidavits were, at the same time, tendered for consideration, if the motion were granted.

We need not specifically rule on the motion, or as to the admissibility of either the dispatches or affidavits, as we are satisfied that the dispatches have no legitimate tendency to establish that the blockade was not effective so far as the exclusion of trade from this port of the belligerent, whether in neutral or enemy's trading ships, was concerned. This country has always recognized the essential difference between a military and a commercial blockade. The one deals with the exclusion of trade, and the other involves the consideration of armed conflict with the belligerent. The necessity of a greater blockading force in the latter case than in the former is obvious. The difference is in kind, and in degree. |

Our Government was originally of opinion that commercial blockades p. 521
in respect of neutral powers ought to be done away with; but that view was not accepted, and during the period of the Civil War the largest commercial blockade ever known was established. Dana's Wheat. Int. Law, (8th ed.) p. 671, note 232; 3 Whart. Int. Dig. § 361.

The letters of Captain Sigsbee, of the St. Paul, and of Commander Davis, of the Dixie, must be read in the light of this recognized distinction; and it is to be further remarked that after the letter of Captain Sigsbee of June 27 the New Orleans was sent by Admiral Sampson officially to blockade the port of San Juan, thereby enormously increasing its efficiency.

In his report of June 28, Appendix, Rep. Bur. Nav. 220, 222, Captain Sigsbee describes an attack on the St. Paul off the port of San Juan, June 22, by the Spanish cruiser Isabella II and by the torpedo boat destroyer Terror, in which engagement the St. Paul severely injured the Terror, and drove the attacking force back into San Juan, and in

his letter of June 27 he wrote: 'It is advisable to constantly keep the Terror in mind as a possible active force; but, leaving her out of consideration, the services to be performed by the Yosemite, of blockading a well-fortified port containing a force of enemy's vessels whose aggregate force is greater than her own, is an especially difficult one. If she permits herself to be driven away from the port, even temporarily, the claim may be set up that the blockade is broken.'

It is true that in closing his letter of June 27 Captain Sigsbee said: 'I venture to suggest that, in order to make the blockade of San Juan positively effective, a considerable force of vessels is needed off that port, enough to detach some to occasionally cruise about the island. West of San Juan the coast,[1] although bold, has outlying dangers, making
p. 522 it easy at | present for blockade runners having local pilots to work in close to the port under the land during the night.'

But we are considering the blockade of the port of San Juan and not of the coast, and while additional vessels to cruise about the island might be desirable in order that the blockade should be positively effective, we think it a sufficient compliance with the obligations of international law if the blockade made egress or ingress dangerous in fact, and that the suggestions of a zealous American naval commander, in anticipation of a conflict of armed forces before San Juan, that the blockade should be brought to the highest efficiency in a military as well as a commercial aspect, cannot be allowed to have the effect of showing that the blockade which did exist was, as to this vessel, ineffective in point of law.

And the letter of Commander Davis of the Dixie, of July 26, 1898, appears to us to have been written wholly from the standpoint of the efficiency of the blockade as a military blockade. He says: 'Captain Folger kept me through the night of the 24th, as he had information which led him to believe that an attack would be made on his ship during the night. There are in San Juan, Porto Rico, the Terror, torpedo gunboat; the Isabella II, cruiser; a torpedo boat, and a gunboat. There is also a German steamer, which is only waiting an opportunity to slip out.' And further: 'It is Captain Folger's opinion that the enemy will attempt to raise the blockade of San Juan, and it is my opinion that he should be reënforced there with the least possible delay.'

In our judgment these naval officers did not doubt the effectiveness of the commercial blockade, and had simply in mind the desirability of rendering the blockade, as a military blockade, impregnable, by the possession of a force sufficient to successfully repel any hostile attack of

[1] The coast thus referred to is described in a work entitled 'Navigation of the Gulf of Mexico and the Caribbean Sea,' issued by the Navy Department, vol. I, 342, thus: 'The shore appears to be skirted by a reef, inclosing numerous small cays and islets, over which the sea breaks violently, and it should not be approached within a distance of four miles.'

the enemy's fleet. The blockade was practically effective ; had remained so ; and was legal and binding, if not raised by an actual driving away of the blockading force by the enemy ; until the happening of which result the neutral trader had no right to ask whether the blockade, as against the possible superiority of the enemy's fleet, was or was not effective in a military sense. |

But was this ship attempting to enter the port of San Juan, on the morning of July 17, when she was captured ? It is contended by counsel for the claimant that if the rulings of the District Court should be disapproved of, an opportunity should still be given it to put in further proofs in respect of the violation of the blockade, notwithstanding it had declined to do so under the order of that court. That order gave ninety days to the captors for further proofs, and to the claimant, thereafter, such time for testimony in reply as might seem proper. After the captors had put in their proofs, the claimant, without introducing anything further, moved for the discharge and restitution of the steamship on the ground of the ineffective character of the blockade, and because the evidence did not justify a decree of condemnation ; but undertook to reserve the right to adduce further proof, in the event that its motion should be denied. The District Court commented with disfavor upon such an attempt, and we think the claimant could not as matter of right demand that the cause should be opened again. The settled practice of prize courts forbids the taking of further proofs under such circumstances ; and in the view we take of the cause it would subserve no useful purpose to permit this to be done. p. 523

On the proofs before us the case is this : The Olinde Rodrigues was a merchant vessel of 1675 tons, belonging to the Compagnie Générale Transatlantique, engaged in the West India trade and receiving a subsidy from the French government for carrying its mails on an itinerary prescribed by the postal authorities. Her regular course was from Havre to St. Thomas, San Juan, Puerto Plata and some other ports, returning by the same ports to Havre. She sailed from Havre, June 16, and arrived at St. Thomas, July 3, and at San Juan the morning of July 4. The proclamation of the blockade of San Juan was issued June 27, while she was on the sea. The United States cruiser Yosemite was on duty in those waters, blockading the port of San Juan, and when her commander sighted the Olinde Rodrigues coming from the eastward toward the port he made chase, but before reaching her she had turned in and was under the protection | of the shore batteries. He lay outside until the next morning—the morning of July 5—when he intercepted the steamship as she was coming out, and sent an officer aboard, who made this entry in her log : ' Warned off San Juan, July 5th, 1898, by U. S. S. Yosemite. Commander Emory. John Burns, Ensign, U. S. p. 524

Navy.' The master of the Olinde Rodrigues, whose testimony was taken *in preparatorio*, testified that when he entered San Juan, July 4, he had no knowledge that the port was blockaded, and that he first heard of it from the Yosemite on July 5, when he was leaving San Juan. After the notification he continued his voyage on the specified itinerary, arriving at Gonaives, the last port outward, on July 12. On his return voyage he stopped at the same ports, taking on freight, passengers and mail for Havre. At Cape Haytien, on July 14, he received a telegram from the agent of his company at San Juan, telling him to hasten his arrival there by one day in order to take on fifty first class passengers, and he replied that the ship would not touch at San Juan, but would be at St. Thomas on the 17th. The purser testified that on the receipt of the cable from the consignee at San Juan, he told the captain 'that since we were advised of the blockade of Porto Rico by the war ship, it was absolutely necessary not to stop;' and that 'before me, the agent in Cape Haytien sent a cablegram, saying "Daim [the vessel] will not stop at San Juan, the blockade being notified."'

The ship's master further testified that on the outward voyage at each port he had warned the agent of the company and the postal department that he would not touch at Porto Rico, that he would not take passengers for that point, and that the letters would be returned to St. Thomas, and that having received his clearance papers at Puerto Plata at half-past five o'clock on the evening of July 15, he did not leave until six o'clock in the morning of July 16, as he did not wish to find himself at night along the coast of Porto Rico.

The ship was a large and valuable one, belonging to a great steamship company of world-wide reputation; she was on her return voyage laden with tobacco, sugar, coffee, and other products of that region; she had
p. 525 no cargo, passengers or mail for San Juan; she had arrived off that port in broad daylight, intentionally according to the captain; her regular itinerary on her return to France would have taken her from Port au Platte to San Juan, and from San Juan to St. Thomas, and thence to Havre, but as San Juan was blockaded and she had been warned off, and could not lawfully stop there, her route was from Port au Platte to St. Thomas, which led her directly by and not many miles from the port of San Juan.

The only possible motive which could be or is assigned for her to attempt to break the blockade is that the consignee at San Juan cabled the captain at Cape Haytien that he must stop at San Juan and take fifty first class passengers. At this time the fleet of Admiral Cervera had been destroyed; Santiago had fallen; and the long reign of Spain in the Antilles was drawing to an end. Doubtless the transportation of fifty first class passengers would prove remunerative, especially as some

of them might be Spanish officials, and Spanish archives and records, and Spanish treasure, might accompany them if they escaped on the ship. It is forcibly argued that these are reasonable inferences, and afforded a sufficient motive for the commission of the offence. But as, where the guilty intent is established, the lack of motive cannot in itself overthrow it, so the presence of motive is not in itself sufficient to supply the lack of evidence of intent. Now, in this case, the captain not only testified that he answered the cable to the effect that he should not stop at San Juan, but the purser explicitly stated that the agent at Cape Haytien sent the telegram for the captain, specifically notifying the agent at San Juan that the ship would not stop there, the blockade having been notified. It is true that the cablegram was not produced, but this was not to be expected in taking the depositions *in preparatorio*, and particularly as it was not the captain's own cablegram, but that of the agent at Cape Haytien. There is nothing in the evidence to the contrary, and under the liberality of the rules of evidence in the administration of the civil law, we must take this as we find it, and, as it stands, the argument that a temptation was held out is answered by the evidence that it was resisted. |

Such being the situation, and the evidence of the ship's officers being explicit that the vessel was on her way to St. Thomas and had no intention of running into San Juan, the decree in her favor must be affirmed on the merits, unless the record elsewhere furnishes evidence sufficient to overcome the conclusion reasonably deducible from the facts above stated. p. 526

Among the papers delivered to the prize master were certain bills of health, five of them by consuls of France, namely, July 9, from St. Marc, Haiti, giving the ship's destination as Havre, with intermediate ports; July 11, from Gonaives, Haiti, giving no destination; July 13, from Port au Prince, July 14, from Cape Haytien, July 15, from Puerto Plata, all naming Havre as the destination; and three by consuls of Denmark, July 13, from Port au Prince, July 14, from Cape Haytien, and July 15, from Puerto Plata, all naming St. Thomas as the destination. When the captain testified August 2, in answer to the standing interrogatories, he said nothing about any Spanish bills of health. The deposition was reread to the captain, August 3, and on the next day, August 4, he wrote to the prize commissioners desiring to correct it, saying: 'I fear I have badly interpreted several questions. I was asked if I had destroyed any papers on board or passports. I replied, no. The papers—documents—on board for our voyage had been delivered up proper and legal to the prize master. This is absolutely the truth, not including in the documents two Spanish bills of health, one from Port au Prince and one from Cape Haytien, which we found in opening our papers, although they

had not been demanded. Not having any value for us, I said to the steward to destroy them on our arrival at Charleston, as we often do with papers that are useless to us. The regular expedition only counts from the last port, which was Puerto Plata, and I refused to take it from our agent for Porto Rico. I swear that at my examination I did not think of this, and it is only on my return from signing that the steward recalled it to me. I never sought to disguise the truth, since I wish to advise you of it as soon as possible.'

p. 527 On the 5th of August the purser answered the interrogatories, | and testified that papers were given him by the consignees of the steamer at Port au Prince in a box at the time of sailing, and he found in the box one manifest of freight in ballast, and it was the same thing at Cape Haytien. At Puerto Plata the agent of the company came on board on their arrival there, and 'the captain told him that there was no Spanish clearance; there was no need of it, and it was not taken.' The captain said to the agent 'it was not necessary, because we are not going to San Juan, being notified of the blockade.' 'When we arrive in a port we put up a placard of the date of departure and the time of sailing and the destination, and it was put up by my personal order from the captain that we sailed for St. Thomas directly, and it was fixed up in the night of the 15th of July. . . . We were to start on the morning of the 16th, at 6 o'clock in the morning, the captain saying he did not want to fall into the hands of the American cruisers during the night. The night before our arrival in Charleston, the doctor says to me, "I have a bill of health, Spanish account, from Cape Haytien and Port au Prince," and I told him I would speak to the captain and ask him what to do with these papers that I had found in sorting my papers—these papers in the pigeon holes. I told the captain that morning, and he told me that we had better destroy them, because we don't want them; that it is not our expedition, and that a true exposition is valuable only for the last port to the Spanish port.'

On the 5th the captain was permitted to testify, in explanation, saying, among other things: 'The reason that we did not give up the two bills of health is because they did not form a part of the clearance of our ship for our itinerary, and they were left in the pigeon holes where they were. It was at the time of our arrival at the quarantine at Charleston that the purser spoke to me of them, and I told him that they were good for nothing and to tear them up. The captain wishes to add that he did not remember the instance the other day about the destruction of papers, that he has just told us about, and that he never had any intention to disguise anything or to deceive.' |

p. 528 Counsel for the Government insist that the intention of the Olinde to run the blockade is necessarily to be inferred from the possession of

these bills of health and their alleged concealment and destruction. Doubtless the spoliation of papers, and, though to a less degree, their concealment, is theoretically a serious offence, and authorizes the presumption of an intention to suppress incriminating evidence, though this is not an irrebuttable presumption.

In *The Pizarro*, 2 Wheat. 227, 241, the rule is thus stated by Mr. Justice Story: 'Concealment, or even spoliation of papers is not of itself a sufficient ground for condemnation in a prize court. It is, undoubtedly, a very awakening circumstance, calculated to excite the vigilance, and to justify the suspicions of the court. But it is a circumstance open to explanation, for it may have arisen from accident, necessity or superior force; and if the party in the first instance fairly and frankly explains it to the satisfaction of the court, it deprives him of no right to which he is otherwise entitled. If, on the other hand, the spoliation be unexplained, or the explanation appear weak and futile; if the cause labor under heavy suspicions, or there be a vehement presumption of bad faith, or gross prevarication, it is made the ground of a denial of further proof, and condemnation ensues from defects in the evidence which the party is not permitted to supply.'

It should be remembered that the first deposition of the captain was given in answer to standing interrogatories, and not under an oral examination; that the statute (Rev. Stat. § 4622) forbade the witness 'to see the interrogatories, documents or papers, or to consult counsel, or with any persons interested, without special authority from the court;' that he was born and had always lived in France, and was apparently not conversant with our language; indeed, he protested, as 'neither understanding nor speaking English,' 'against all interpretation or translation contrary to my thought;' that the deposition having been reread to him the day after it was taken, he detected its want of fulness, and immediately wrote the prize commissioners on the subject with a view to correction; | and that it was after this, and not before, that the purser p. 529
testified.

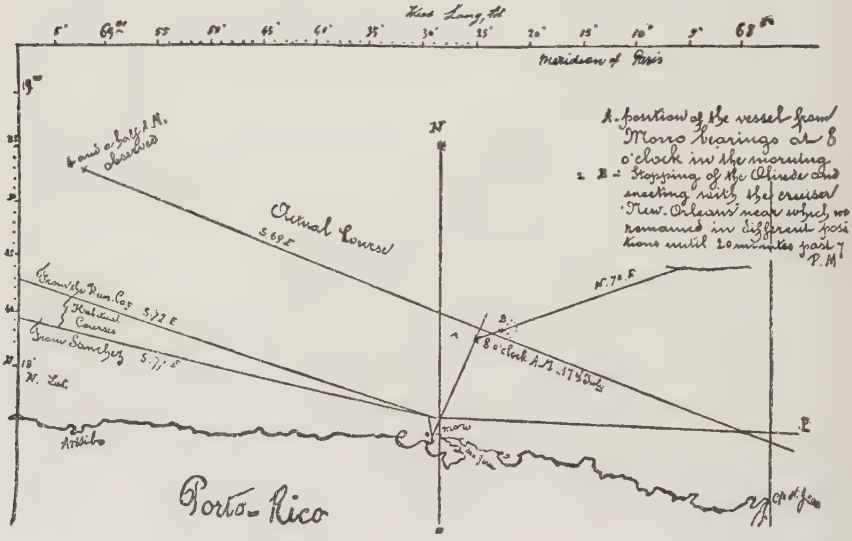
Transactions of this sort constitute in themselves no ground for condemnation, but are evidence, more or less convincing, of the existence of such ground; yet, taking the evidence in this case together, we are not prepared to hold that the explanation as to how these bills came to be received on board, neglected when the papers were surrendered, and finally torn up, was not sufficient to obviate any decisive inference of objectionable intention.

The Government further insisted that the Olinde Rodrigues refused to obey the signal from the New Orleans to heave to and stop instantly, and turned only after she had fired, and that this conclusively established an intention to violate the blockade. The theory of the Government is

that the French ship purposely held on so as to get under the protection of the batteries of San Juan.

The log of the Olinde Rodrigues states: '6.30, noticed the heights of San Juan. At 7.20, took the bearings of the fortress at 45 degrees, eight miles and one half crosswise. Noticed, at 7.50, a man-of-war. At 8.10, she signalled 'J. W.,'' ['heave to and stop instantly.'] I went towards it and made arrangements in order to receive the whale boat which is sent to us.'

In a communication to the Ambassador of France at Washington, written July 17, and purporting to give a full account of the matter, the



captain said that he 'was some time before seeing her signal, on account of the distance and of the sun. Suspecting what she wanted, I hoisted the " perceived " and stopped.'

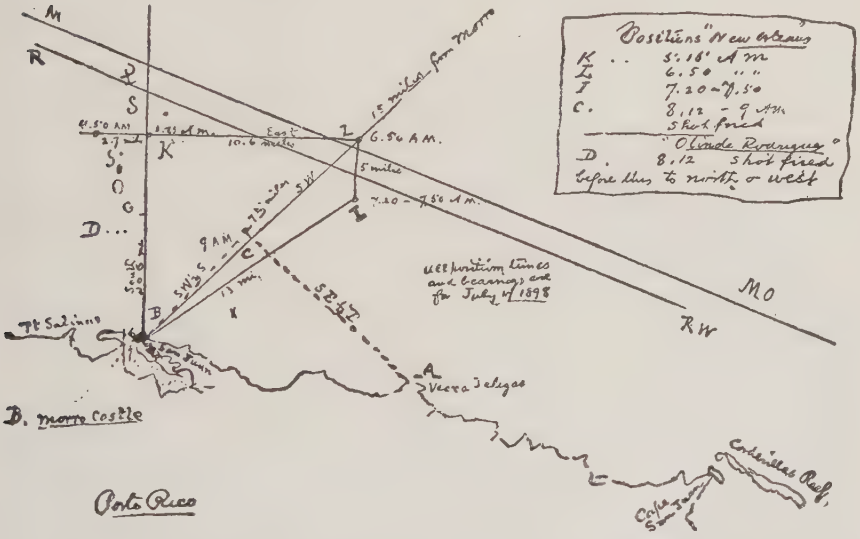
He testified that he turned his vessel to the war ship before the gun was fired, which was at 8.12, but on this point the evidence is strongly to the contrary. We are inclined to think that some allowance should be made for imperfect recollection in the rapid passage of events. The Olinde Rodrigues was comparatively a slow sailer, (ten to twelve knots,) and if the captain stopped on seeing the signal, and turned towards the
p. 530 war ship with reasonable promptness, a settled purpose to | defy the signal ought not to be imputed, whether she started towards the New Orleans just before, just after, or just as the shot was fired.

The stress of the contention of the Government is, however, that the Olinde Rodrigues was on a course directly into the port of San Juan

at the time her progress was arrested. It is extremely difficult to be precise in such a matter, as her course to reach St. Thomas necessarily passed in face of San Juan. The captain attached to his explanatory affidavit a sketch, 'showing the usual route and the actual route which he was taking at the time of the capture, with the position of the capturing ship and his own ship,' as follows, see p. 1878.

But it appears from the entries of the second officer on the log of the Olinde Rodrigues that the ship was from one to five o'clock in the morning of July 17 on the course, (as corrected,) S. 69 E., and that from six to eight o'clock the course was S. 73 E.

The captain testified that at the time of capture: 'I had just passed



the port of San Juan, about 7 or 8 miles eastward of the port, and about 9 miles from shore, about 9 miles from Morro. They judged the distance in passing as they do from all points.'

The second officer said that 'they were 9 miles from San Juan after having passed the port of San Juan and gone 4 miles east of it.'

This testimony strikingly confirms Captain Folger's candid expression of opinion that though the master of the Olinde Rodrigues may have been going in and out of that port for years, he did not measure the distances, but 'would run so far down the coast and order them to steer to a certain point to head in.'

The commander of the New Orleans admitted 'that south 69 is the proper course beforehand for the Culebra Passage,' (the passage through which to reach St. Thomas,) but contested that the French vessel was making that course.

Lieutenant Rooney, the navigator of the New Orleans, laid down the positions upon a chart as follows, see p. 1879. |

p. 533 The point C is seven and two thirds miles from Morro, bearing S. W., and five miles from point D, the intersection of a line drawn west with north and south line through Morro. D is five and two thirds miles from Morro. The range of Morro guns was six and one half miles, and the range of the shore batteries, three miles east of Morro, also six and one half miles. According to this plat, the Olinde Rodrigues was slightly within the range of the Morro guns, but not within the range of the shore batteries. The New Orleans when she fired was close to the range of the shore batteries and something over a mile outside of the extreme range of the Morro guns.

And it is urged that the conclusion is inevitable that the French ship intended to run into the port and to draw the pursuing cruiser within the range of the Spanish guns. If her being in the neighborhood were not satisfactorily explained; if she persistently ignored the signal of the cruiser; and if her course was a course into the port of San Juan and not a proper course to reach St. Thomas, then the conclusion may be admitted; but it is not denied that she was in the neighborhood in the discharge of her duty, and we have already seen that she may be consistently regarded as not having defied the signal.

On the part of the captors, the witnesses concurred that the Olinde Rodrigues' course was laid for the port of San Juan, while on her behalf this was denied, except so far as her course for St. Thomas took her near the blockaded port. In addition to the witnesses from the New Orleans the telegraph operator on the Morro testified that the Olinde Rodrigues was coming directly toward the Morro, but changed her course when the shot was fired.

A principal reason given by the witnesses for concluding that the Olinde Rodrigues was making for San Juan was that her masts, as seen from the deck of the New Orleans, were open, thus indicating that she was sailing south or toward the port of San Juan. It was admitted that this would not necessarily be so unless the New Orleans was on the same

p. 534 line east and west with the other vessel, or, in other words, if the | New Orleans were to the north of the Olinde Rodrigues, the latter's masts might appear open without necessarily indicating that she was sailing south, or towards the land. Lieutenant Rooney did not see her until after she was captured. He is positive as to the approximate position of the New Orleans early in the morning before the Olinde Rodrigues was sighted, which had not occurred when he went below at 7.30, and he is positive as to the position of the New Orleans after the capture. He places the position of the New Orleans at 6.50, when the last bearing observation was taken, at fifteen miles north of the coast and of the

Morro. At nine o'clock bearings were again taken, and she was about seven and two thirds miles from the Morro. Lieutenant Rooney explained in his testimony the proper courses for a vessel sailing to St. Thomas, and stated that several courses might be properly steered, that one of them would be to pass about twelve miles north of the harbor of San Juan, and that there was nothing impracticable in a vessel reaching Culebra Point, with a view of going to St. Thomas, on a course of S. 69 E. from midnight to 5 o'clock, and a change at 5 o'clock to S. 73 E. He also testified that a vessel bound for San Juan on an ordinary commercial voyage would have been nearer the shore than where the Olinde Rodrigues was when she was captured, and that it was probable that if she intended to go to San Juan and avoid the New Orleans she would have hugged the shore and not been out at sea.

Some of the evidence, in short, had a tendency to show that the Olinde Rodrigues, when sailing on a proper course for St. Thomas, would be drawing to the south, and that the New Orleans was to the north of her, in which case, obviously, the nearer the vessels approached the more open would the masts of the Olinde Rodrigues appear. But the clear preponderance was that the captured ship was to the west of a north and south line drawn through Morro, and running nearly south just before or when the New Orleans fired.

It is impossible to deny that the testimony of Captain Folger, the commander of the New Orleans, and of his officers, was extremely strong and persuasive to establish that the | Olinde Rodrigues, when brought to, p. 535
was intentionally heading for San Juan, and pursuing her course in such a manner as to draw the blockading cruiser in range of the enemy's batteries, and yet we must consider it in view of the evidence on behalf of the captured ship, and of the undisputed facts tending to render it improbable that any design of attempting to violate the blockade was entertained. The Olinde Rodrigues had neither passengers nor cargo for San Juan; in committing the offence, she would take the risk of capture or of being shut up in that port; she was a merchantman engaged in her regular business and carrying the mails; she was owned by a widely known and reputable company; her regular course, though interrupted by the blockade of that port, led directly by it, and not far from it; and the testimony of her captain and officers denied any intention to commit a breach.

The evidence of evil intent must be clear and convincing before a merchant ship belonging to citizens of a friendly nation will be condemned. And on a careful review of the entire evidence, we think we are not compelled to proceed to that extremity.

But, on the other hand, we are bound to say that, taking all the circumstances together and giving due weight to the evidence on behalf

of the captors, probable cause for making the capture undoubtedly existed; and the case disclosed does not commend this vessel to the favorable consideration of the court.

Probable cause exists where there are circumstances sufficient to warrant suspicion though it may turn out that the facts are not sufficient to warrant condemnation. And whether they are or not cannot be determined unless the customary proceedings of prize are instituted and enforced. *The Adeline*, 9 Cranch, 244, 285; *The Thompson*, 3 Wall. 155. Even if not found sufficient to condemn, restitution will not necessarily be made absolutely, but may be decreed conditionally as each case requires, and an order of restitution does not prove lack of probable cause. *The Adeline, supra; Jennings* v. *Carson*, 4 Cranch, 2, 28, 29.

p. 536 In the statement of Sir William Scott and Sir John Nicholl, | transmitted to Chief Justice Jay, then Minister to England, by Sir William Scott, September 10, 1794, 'the general principles of proceeding in prize causes, in British Courts of Admiralty, and of the measures proper to be taken when a ship and cargo are brought in as prize within their jurisdictions,' are set forth as laid down in an extract from a report made to the King in 1753 'by Sir George Lee, then Judge of the Prerogative Court, Dr. Paul, His Majesty's Advocate General, Sir Dudley Rider, His Majesty's Attorney General, and Mr. Murray, (afterwards Lord Mansfield,) His Majesty's Solicitor General;' and many instances are given where in the enforcement of the rules 'the law of nations allows, according to the different degrees of misbehavior, or suspicion, arising from the fault of the ship taken, and other circumstances of the case, costs to be paid, or not to be received, by the claimant, in case of acquittal and restitution.' Wheaton on Captures, Appendix, 309, 311, 312; Pratt's Story's Notes, p. 35.

In *The Apollon*, 9 Wheat. 362, 372, Mr. Justice Story said: 'No principle is better settled in the law of prize than the rule that probable cause will not merely excuse, but even, in some cases, justify a capture. If there be probable cause, the captors are entitled, as of right, to an exemption from damages; and if the case be of strong and vehement suspicion, or requires further proof to entitle the claimant to restitution, the law of prize proceeds yet farther, and gives the captors their costs and expenses in proceeding to adjudication.'

Section 4639 of the Revised Statutes contemplates that, under circumstances, all costs and expenses shall remain charged on the captured vessel though she be restored, and this court has repeatedly held that damages and costs will be denied where there was probable cause for seizure, and that sometimes costs will be awarded to the captors. *The Venus*, 5 Wheat. 127; *The Thompson*, 3 Wall. 155; *The Springbok*,

5 Wall. 1; *The Dashing Wave*, 5 Wall. 170; *The Sir William Peel*, 5 Wall. 517; *The Peterhoff*, 5 Wall. 28, 61, 62.

In *The Dashing Wave*, Chief Justice Chase said: 'We think it was the plain duty of a neutral claiming to be engaged in trade with Matamoras, under circumstances which | warranted close observation by the p. 537
blockading squadron, to keep his vessel, while discharging or receiving cargo, so clearly on the neutral side of the boundary line as to repel, so far as position could repel, all imputation of intent to break the blockade. He had no right to take, voluntarily, a position in the immediate presence of the blockading fleet, from which merchandise might be so easily introduced into the blockaded region. We do not say that neglect of duty, in this respect, on the part of the brig, especially in the absence of positive evidence that the neglect was wilful, calls for condemnation; but we cannot doubt that under the circumstances described, capturing and sending in for adjudication was fully warranted.'

In *The Springbok*, the ship was restored but costs and damages were not allowed because of the misconduct of the master.

In *The Peterhoff*, payment of costs and expenses by the ship was decreed as a condition of restitution. The Peterhoff was captured by the United States vessel of war Vanderbilt on suspicion of intent to run the blockade and of having contraband on board. Her captain refused to take his papers to the Vanderbilt, and, in addition, papers were destroyed and a package was thrown overboard. The Peterhoff was searched, and it is stated in the opinion: 'The search led to the belief on the part of the officers of the Vanderbilt that there was contraband on board, destined to the enemy. This belief, it is now apparent, was warranted. It was therefore the duty of the captors to bring the Peterhoff in for adjudication, and clearly they are not liable for the costs and expenses of doing so.' The court then commented on the destruction of papers, and the throwing overboard of the package, in regard to which it was unable to credit the representations of the captain, but in view of the other facts in the case, did not extend the effect of the captain's conduct and the incriminating circumstances to condemnation.

The case before us falls plainly within these rulings. This vessel had gone into San Juan on July 4, although the captain had heard of the blockade at St. Thomas, but he says he had | not been officially notified p. 538
of it; he telegraphed to the consul at San Juan to know, and was answered that they had received no official notice from Washington that the port was blockaded; he also heard while in San Juan that 'it would be blockaded some future time, but that was not officially.' The vessel was boarded and warned by the Yosemite on July 5,

and the warning entered on her log. This imposed upon her the duty to avoid approaching San Juan, on her return, so nearly as to give just cause of suspicion, yet she so shaped her course as inevitably to invite it.

When the New Orleans succeeded the Yosemite her commander was informed of the facts by his predecessor, and knew that whatever the right of the Olinde Rodrigues to be in those waters, she could not lawfully place herself so near the interdicted port as to be able to break the blockade with impunity. But when he sighted her the ship was on a course to all appearance directly into that port, and steadily pursuing it. And when he signalled, the Olinde Rodrigues apparently did not obey, but seemingly persisted on her course, and that course would in a few moments have placed her within the range of the guns of Morro and of the shore batteries. In fact, when the shot was fired she was within the range of the Morro's guns. The evidence is overwhelming that she did not change her course until after the shot was fired, even though she may have stopped as soon as she saw the signal. The turning point into the Culebra or Virgin Passage was perhaps forty miles to the eastward, and while she could have passed the port of San Juan on the course she was on, it would have been within a very short distance. The disregard of her duty to shun the port and not approach it was so flagrant that the intention to break the blockade was to be presumed, though we do not hold that that was a presumption *de jure*.

The ship's log was not produced until three hours after she was boarded, and it now appears that the papers furnished the boarding officer, ' said to be all the ship's papers,' did not include two Spanish bills of health in which San Juan was entered as the vessel's destination. These were destroyed after the ship reached Charleston, and were, there-
p. 539 fore, in the ship's | possession when the other papers were delivered. Had they been shown, as they should have been, can it be denied that they would have furnished strong corroboration of criminal intent ? Or that their destruction tended to make a case of ' strong and vehement suspicion ' ?

The entire record considered, we are of opinion that restitution of the Olinde Rodrigues should be awarded, without damages, and that payment of the costs and expenses incident to her custody and preservation, and of all costs in the cause except the fees of counsel, should be imposed upon the ship.

The decree of the District Court will be so modified, and

As modified affirmed.

Mr. Justice McKenna dissented on the ground that the evidence justified condemnation.

Coudert, Administrator, v. United States.

(175 U.S. Reports, 178) 1899.

ERROR TO THE CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT.

No. 15. Argued October 10, 1899.—Decided November 20, 1899.

Money derived from the sale of a vessel captured in 1863 as a blockade runner, which, pending proceedings in court for condemnation and forfeiture, was deposited by the marshal to await the further order of the court in a national bank which was a special or designated depositary of public moneys, and which deposit was in part lost by reason of the failure of the bank, is not public money of the United States which may be recovered from it under the act of March 3, 1887, c. 359, 24 Stat. 505, generally known as the Tucker Act.

THE statement of the case will be found in the opinion.

Mr. Frederic R. Coudert, Jr., for plaintiff in error. *Mr. Charles Frederic Adams* was on his brief.

Mr. Assistant Attorney General Pradt for defendant in error.

MR. JUSTICE MCKENNA delivered the opinion of the court.

The plaintiff bases his right of action on the act of March 3, 1887, c. 359, known as the Tucker Act, 24 Stat. 505, and the following facts:

In November, 1863, the United States vessel Granite City seized the Spanish bark Teresita, the property of Raphael Madrazo, in the Gulf of Mexico as a blockade runner. Proceedings were instituted for her condemnation and forfeiture in the District Court for the Eastern District of Louisiana. By order of the court, dated August 23, 1864, she and her cargo were sold by the United States marshal, and the proceeds of the sale, amounting to the sum of $10,359.20, after deducting costs and other charges, were deposited by the marshal in the First National Bank of New Orleans, a special or designated depositary of public moneys of the United States, | to await the further order of the court. Judgment was p. 179
subsequently rendered in favor of the claimant against the United States, from which the latter appealed to the Supreme Court, obtaining a supersedeas pending the appeal. The judgment was affirmed and restitution of the vessel and cargo directed. *The Teresita*, 5 Wall. 180.

Pending the appeal to the Supreme Court, the bank failed, and a receiver was duly appointed of its assets. In liquidating its affairs the receiver paid Madrazo during his lifetime, and to his representatives after his death, dividends amounting in all to $8183.87, the first payment May 1, 1871, the last on September 28, 1882. Madrazo died in Cuba on the 14th of April, 1877, and on the 20th of September, 1888, ancillary letters of administration were issued in the county of New York to the plaintiff in error.

After the payment of September 28, 1882, the receiver had no further funds applicable to the claim. This action was brought September 24,

1888, for the sum of $2175.43, the balance of the proceeds of the sale after deducting the payments made by the receiver.

The Circuit Court rendered judgment for the plaintiff for the amount claimed with interest from September 28, 1882. The Circuit Court of Appeals reversed the judgment, 38 U.S. App. 515, and the case was brought here.

The contention of plaintiff in error is that the deposit of the proceeds of the sale of the Teresita in the First National Bank of New Orleans, then a depositary of the public moneys of the United States, was a payment into the Treasury of the United States, and hence a receipt thereof by the United States, and, ' consequently, a sum of money equal to the whole of such net proceeds must be held to have become payable to the claimant by the United States under the decree of restitution wholly irrespective of any loss of particular assets of the Treasury through the failure of the bank.'

A similar contention was made upon facts very much the same in *Branch* v. *United States*, 100 U.S. 673. In that case certain cotton was seized under the Confiscation Act and sold during the progress of a suit
p. 180 for its condemnation by order of | the court, and the proceeds deposited by the clerk to await the further order of the court in the First National Bank of Selma, Alabama, upon a notification of the Secretary of the Interior that such bank had been designated by the Secretary of the Treasury as a depositary of public money. The suit was dismissed and judgment entered in favor of the defendants for costs. Pending the suit the bank failed, and in the proceedings for winding up its affairs a dividend upon the deposit was paid to the court, and then by order paid over to the claimants. A suit was brought against the United States for the balance of the original deposit upon the ground that the Selma bank was at the time of the deposit a designated depositary of public money and was part of the Treasury of the United States, and that consequently a deposit in it was a payment into the Treasury of the United States, binding the latter to its return if the decision of the court should be against condemnation. To the contention the court answered by Chief Justice Waite : ' The position assumed by the appellants is to our minds wholly untenable. The designated depositaries are intended as places for the deposit of the public moneys of the United States ; that is to say, moneys belonging to the United States. No officer of the United States can charge the Government with liability for moneys in his hands not public moneys by depositing them to his own credit in a bank designated as a depositary. In this case, the money deposited belonged for the time being to the court, and was held as a trust fund pending the litigation. The United States claimed it, but their claim was contested. So long as this contest remained undecided, the officers of the Treasury could not

control the fund. Although deposited with a bank that was a designated depositary, it was not paid into the Treasury. No one could withdraw it except the court or the clerk, and it was held for the benefit of whomsoever in the end it should be found to belong.'

But that case is claimed to be distinguished from the pending one because the Confiscation Act, under which the *Branch case* was decided, contained no provision for the deposit in the Treasury, *pendente lite*, of the proceeds of property seized but *not yet finally condemned.* |

In other words, the argument is that there was no provision in the p. 181
Confiscation Act which required a deposit of the proceeds of the sale of property seized, and hence the deposit was the personal act of the officer, neither directed nor authorized by law, and did not charge the United States with responsibility, but that in the pending case, in pursuance of law, the deposit was virtually in the Treasury of the United States and became the property of the United States—' assets of the Treasury '—and subject, as public moneys are subject, to the use of the United States, and that the relation of debtor and creditor was created between the owner of the property sold and the United States.

The argument concedes, and necessarily, that there must have been authority or requirement of law for the deposit in this case. Was there such authority or requirement ? It is claimed to have been contained in certain statutes of the United States which enabled the Secretary of the Treasury to designate national banks as public depositaries and by the acts of March 3, 1863, 12 Stat. 759, c. 86, and June 30, 1864, c. 174, 13 Stat. 308.

The latter acts respectively provided, with some difference of expression and detail, that ' prize property ' may be ordered sold by the court *pendente lite*, and upon any sale it shall be the duty of the marshal ' forthwith to deposit the gross proceeds of the sale with the Assistant Treasurer of the United States nearest the place of sale, subject to the order of the court in the particular case.' This direction of the statutes was not complied with. Its practical and legal alternative, it is contended, was complied with by a deposit of the proceeds of the sale of the Teresita in the New Orleans bank, then a public depositary, which by such designation became the Treasury of the United States.

It is impracticable to quote all the provisions of law in regard to the deposit, keeping and disbursement of the moneys of the United States. They will be found with a reference to the statutes of which they are the reproduction in the Revised Statutes of the United States, Title XL, Public Moneys. It is sufficient to say that places of deposit of the public moneys | are provided, and the duty of the officers who receive and dis- p. 182
burse them. From these provisions it will be seen that the public moneys of the United States are the revenues of the United States from all sources,

and the gross amount received must first be paid into the Treasury. (Secs. 3617 and 3618.) They are then subject to the draft of the Treasurer of the United States drawn agreeably to appropriations made by law. (Secs. 3593 and 3642. See also sec. 3210.)

From this summary we may more clearly understand the particular provisions of law which were applicable to public depositaries at the time of the deposit in this case. They were contained in the act of March 3, 1857, c. 114, 11 Stat. 249, § 3621, Rev. Stat., and in section 45 of the General Banking Act of June 3, 1864, c. 106, 13 Stat. 99, 113 § 3620, Rev. Stat.

The first act provided that ' every disbursing officer or agent of the United States having any *money of the United States* intrusted to him for disbursement shall be and is hereby required to deposit the same with the Treasurer of the United States or with some one of the Assistant Treasurers or public depositaries, and draw for the same only in favor of the persons to whom payment is to be made in pursuance of law and instructions ; except when payments are to be made in sums under twenty dollars, in which case such disbursing agent may check in his own name, stating that it is to pay small claims.'

The second act provided that ' all associations under this act, when designated for that purpose by the Secretary of the Treasury, shall be depositaries of public money, except receipts from customs, under such regulations as may be prescribed by the Secretary ; they may also be employed as financial agents of the government ; and they shall perform all such reasonable duties, as depositaries of public moneys and financial agents of the government, as may be required of them. And the Secretary of the Treasury shall require of the associations thus designated satisfactory security, by the deposit of United States bonds and otherwise, for the safekeeping and prompt payment of the public money deposited
p. 183 with them, and for the faithful performance of their | duties as financial agents of the government ; Provided, that every association which shall be selected and designated as receiver or depositary of the public money shall take and receive at par all of the national currency bills, by whatever association issued, which have been paid into the government for internal revenue or for loans or stocks.'

It was also provided by the act of August 6, 1846, sec. 3616, Rev. Stat., ' All marshals, district attorneys and other persons than those mentioned in the preceding section, having public money to pay to the United States, may pay the same to any depositary constituted by or in pursuance of law which may be designated by the Secretary of the Treasury.'

It is obvious from these provisions that it was only *public money* of the United States of which national banks could be made depositaries, and it was therefore only *public money* which an officer could deposit

in them, whether he received it originally or received it to disburse. This is the ruling in the *Branch case*, and it is clearly applicable to the case at bar. By the seizure of the Teresita the title to her did not change nor the title to the proceeds of her sale, *pendente lite*. That awaited adjudication, and whatever relations to such proceeds or responsibility for them the United States might have assumed if they had been deposited with an Assistant Treasurer, they did not become public money and subject to the statutes applicable to public money, and authorized to be deposited in a public depositary.

It is not without significance that when Congress authorized 'moneys paid into any court of the United States, or received by the officers thereof, in any cause pending or adjudicated in such court,' to be deposited with a designated depositary, it required it to be done 'in the name and to the credit of such court,' and not to the credit of the United States. Act of March 24, 1871, c. 2, 17 Stat. 1.

Judgment affirmed.

NOTE.—This case stood on the docket in the name of Charles Coudert as ancillary executor. Just before it was reached for argument, his death was suggested, and the appearance of Paul Fuller as administrator was entered.

The Pedro.

(175 U.S. Reports, 354) 1899.

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE SOUTHERN DISTRICT OF FLORIDA.

No. 115. Argued November 2, 3, 1899.—Decided December 11, 1899.

On the 20th of April, 1898, a joint resolution of Congress was approved by the President declaring that the people of Cuba are, and of right ought to be, free and independent. On the same day the Minister of Spain at Washington demanded his passport, and the diplomatic relations of Spain with the United States were terminated. On the 22d of the same April a blockade of a part of the coast of Cuba was instituted. On the 23d of the same month, in a proclamation of the Queen Regent of Spain it was declared that a state of war was existing between Spain and the United States. On the 26th of the same month the President issued a proclamation, declaring that a state of war existed between the United States and Spain, the fourth and fifth articles of which proclamation were as follows: '4. Spanish merchant vessels in any ports or places within the United States shall be allowed till May 21, 1898, inclusive, for loading their cargoes and departing from such ports or places; and such Spanish merchant vessels, if met at sea by any United States ship shall be permitted to continue their voyage if, on examination of their papers, it shall appear that their cargoes were taken on board before the expiration of the above term; Provided, that nothing herein contained shall apply to the Spanish vessels having on board any officers in the military or naval service of the enemy, or any coal (except such as may be necessary for their voyage), or any other article prohibited or contraband of war, or any dispatch of or to the Spanish Government.' '5. Any Spanish merchant vessel which, prior to April 21, 1898, shall have sailed

from any foreign port bound for any port or place in the United States, shall be permitted to enter such port or place and to discharge her cargo, and afterwards forthwith to depart without molestation; and any such vessel, if met at sea by any United States ship, shall be permitted to continue her voyage |
p. 355 to any port not blockaded.' The Pedro was built in England, sailed under the British flag till 1887, and then was transferred to a Spanish corporation, and sailed under the Spanish flag. Sailing from Antwerp she arrived at Havana with a cargo April 17, 1898. She remained there five days, discharged her cargo and left for Santiago April 22. At 6 o'clock on that evening, when about 15 miles east of the Morro, and 5 miles north of the Cuban coast, she was captured by the New York, of the blockading fleet, sent to Key West, and there libelled and condemned. *Held*,

(1) That the language of the proclamation was plain, and not open to interpretation;

(2) That the Pedro did not come within Article 4 of the proclamation; nor within Article 5; nor within the reasons usually assigned for exemption from capture;

(3) That it must be assumed that she was advised of the strained relations between the United States and Spain;

(4) That being owned by a Spanish corporation, having a Spanish registry, and sailing under a Spanish flag and a Spanish license, and being officered and manned by Spaniards, she must be deemed to be a Spanish ship, although she was insured against risks of war by British underwriters—that fact being immaterial.

THIS was an appeal from a decree of the District Court of the United States for the Southern District of Florida condemning the steamer Pedro as lawful prize of war on a libel filed April 23, 1898.

April 20, 1898, the President approved the following joint resolution:

'First. That the people of the Island of Cuba are, and of right ought to be, free and independent.

'Second. That it is the duty of the United States to demand, and the Government of the United States does hereby demand, that the Government of Spain at once relinquish its authority and government in the Island of Cuba and withdraw its land and naval forces from Cuba and Cuban waters.

'Third. That the President of the United States be, and he hereby is, directed and empowered to use the entire land and naval forces of the United States, and to call into the actual service of the United States the militia of the several States, to such extent as may be necessary to carry these resolutions into effect.

'Fourth. That the United States hereby disclaims any disposition |
p. 356 or intention to exercise sovereignty, jurisdiction or control over said Island except for the pacification thereof, and asserts its determination, when that is accomplished, to leave the government and control of the Island to its people.' 30 Stat. 738.

On the same day, the Minister of Spain to the United States requested and obtained his passports; the text of the resolution was cabled to

the Minister of the United States at Madrid ; and the Secretary of State by separate dispatch directed him to communicate the resolution to the Government of Spain with the formal demand of the United States therein made, and the notification that, in the absence of a response by April 23, the President would proceed without further notice to use the power and authority enjoined and conferred upon him.

April 21, the Minister of the United States at Madrid acknowledged the receipt of the Secretary's dispatch that morning, but saying that before he had communicated it he had been notified by the Minister of Foreign Affairs of Spain that diplomatic relations were broken off between the two countries, and that he had accordingly asked for his passports. The letter from the Minister of Foreign Affairs of Spain referred to was as follows :

' In compliance with a painful duty I have the honor to inform Your Excellency that the President having approved a resolution of both Chambers of the United States, which in denying the legitimate sovereignty of Spain and threatening an immediate armed intervention in Cuba, is equivalent to an evident declaration of war, the Government of His Majesty has ordered its Minister in Washington to withdraw without loss of time from the North American territory, with all the personnel of the Legation. By this act the diplomatic relations which previously existed between the two countries are broken off, all official communications between their respective representatives ceasing, and I hasten to communicate this to Your Excellency in order that on your part you may make such dispositions as seem suitable. I beg Your Excellency to acknowledge the receipt of this note at such time as you deem | proper, p. 357 and I avail myself of this opportunity to reiterate to you the assurances of my distinguished consideration.'

The Secretary of the Navy at once gave instructions to the commander in chief of the North Atlantic Squadron to ' immediately institute a blockade of the North coast of Cuba, extending from Cardenas on the east to Bahia Honda on the west ; also, if in your opinion your force warrants, the port of Cienfuegos, on the south side of the island. . . . It is believed that this blockade will cut off Havana almost entirely from receiving supplies from the outside. . . . The Department does not wish the defences of Havana to be bombarded or attacked by your squadron.'

April 22, Admiral Sampson, in command, instituted the blockade and on that day the President issued the following proclamation :

' Whereas, by a joint resolution passed by the Congress and approved April 20, 1898, and communicated to the Government of Spain, it was demanded that said Government at once relinquish its authority and government in the Island of Cuba, and withdraw its land and naval forces from Cuba and Cuban waters ; and the President of the United States

was directed and empowered to use the entire land and naval forces of the United States, and to call into the actual service of the United States the militia of the several States to such extent as might be necessary to carry said resolution into effect; and

'Whereas, in carrying into effect said resolution, the President of the United States deems it necessary to set on foot and maintain a blockade of the North coast of Cuba, including all ports on said coast between Cardenas and Bahia Honda and the port of Cienfuegos on the South coast of Cuba:

'Now, therefore, I, William McKinley, President of the United States, in order to enforce the said resolution, do hereby declare and proclaim that the United States of America have instituted, and will maintain a blockade of the North coast of Cuba, including ports on said coast between Cardenas and Bahia Honda and the port of Cienfuegos on
p. 358 the | South coast of Cuba, aforesaid, in pursuance of the laws of the United States and the law of nations applicable to such cases. An efficient force will be posted so as to prevent the entrance and exit of vessels from the ports aforesaid. Any neutral vessel approaching any of the said ports, or attempting to leave the same, without notice or knowledge of the establishment of such blockade, will be duly warned by the Commander of the blockading forces, who will indorse on her register the fact, and the date, of such warning, where such indorsement was made; and if the same vessel shall again attempt to enter any blockaded port, she will be captured and sent to the nearest convenient port for such proceedings against her and her cargo as prize, as may be deemed advisable.

'Neutral vessels lying in any of said ports at the time of the establishment of such blockade will be allowed thirty days to issue therefrom.' 30 Stat. 1769.

April 23 the Queen Regent of Spain issued a decree, in which, among other things, it was stated:

'Article I. The state of war existing between Spain and the United States terminates the treaty of peace and friendship of the 27th October, 1795, the protocol of the 12th January, 1877, and all other agreements, compacts and conventions that have been in force up to the present between the two countries.

'Art. II. A term of five days from the date of the publication of the present royal decree in the Madrid Gazette is allowed to all United States ships anchored in Spanish ports, during which they are at liberty to depart.'

April 25, in response to a message from the President, Congress passed the following act, which was thereupon duly and at once approved:

'First. That war be, and the same is hereby, declared to exist, and

that war has existed since the twenty-first day of April, Anno Domini eighteen hundred and ninety-eight, including said day, between the United States of America and the Kingdom of Spain.

'Second. That the President of the United States be, | and he hereby p. 359
is, directed and empowered to use the entire land and naval forces of the United States, and to call into the actual service of the United States the militia of the several States, to such extent as may be necessary to carry this act into effect.' 30 Stat. 364.

April 26 the President issued a further proclamation, as follows:

'Whereas, By an act of Congress, approved April 25, 1898, it is declared that war exists, and that war has existed since the 21st day of April, A.D. 1898, including said day, between the United States of America and the Kingdom of Spain; and

'Whereas, It being desirable that such war should be conducted upon principles in harmony with the present views of nations and sanctioned by their recent practice, it has already been announced that the policy of this Government will be not to resort to privateering, but to adhere to the rules of the declaration of Paris:

'Now, therefore, I, William McKinley, President of the United States of America, by virtue of the power vested in me by the Constitution and the laws, do hereby declare and proclaim:

'1. The neutral flag covers enemy's goods, with the exception of contraband of war.

'2. Neutral goods, not contraband of war, are not liable to confiscation under the enemy's flag.

'3. Blockades in order to be binding must be effective.

'4. Spanish merchant vessels, in any ports or places within the United States, shall be allowed till May 21, 1898, inclusive, for loading their cargoes and departing from such ports or places; and such Spanish merchant vessels, if met at sea, by any United States ship, shall be permitted to continue their voyage, if, on examination of their papers, it shall appear that their cargoes were taken on board before the expiration of the above term; Provided, that nothing herein contained shall apply to Spanish vessels having on board any officer in the military or naval service of the enemy, or any coal (except such as may be necessary for the voyage), or any other article | prohibited or contraband of war, or p. 360
any dispatch of or to the Spanish Government.

'5. Any Spanish merchant vessel which, prior to April 21, 1898, shall have sailed from any foreign port bound for any port or place in the United States, shall be permitted to enter such port or place, and to discharge her cargo, and afterwards forthwith to depart without molestation; and any such vessel, if met at sea by any United States ship, shall be permitted to continue her voyage to any port not blockaded.

'6. The right of search is to be exercised with strict regard for the rights of neutrals, and the voyages of mail steamers are not to be interfered with except on the clearest grounds of suspicion of a violation of law in respect of contraband or blockade.' 30 Stat. 1770.

The steamship Pedro was built at Newcastle, England, in 1883, and, until 1887, sailed under British registry and the name of Lilburn Tower. In the latter year her name was changed to The Pedro, and she was transferred to La Compañia La Flecha, a Spanish corporation of Bilboa, Spain, and registered at that port in its name, and on October 4, 1887, obtained a royal patent from the Crown of Spain, which was issued to her as the property of the company. Thereafter she sailed under the Spanish flag and was officered and manned by Spaniards, though she was engaged in the transportation of cargo for hire as a merchant vessel under the management of G. H. Fletcher and Company of Liverpool. Her voyages began in Europe where she took cargo for Cuban ports, from which ports on discharge she proceeded to ports of the United States, where she took cargo for a port of discharge in Europe, the round trip occupying about three months. Between March 20 and March 25, 1898, she took on board at Antwerp, Belgium, some 2000 tons of cargo for Havana, Santiago de Cuba, and Cienfuegos, Cuba, of which 1700 tons was rice, and the rest hardware, empty bottles, paper, cement and general cargo.

On March 18, 1898, she was chartered to the firm of Keyser and Company, being described in the charter party as 'now loading in
p. 361 Antwerp for Cuba,' to proceed to Pensacola, Florida, | or Ship Island, Mississippi, 'with all convenient speed,' to load a cargo of lumber for Rotterdam or Antwerp. The charter party provided that 'should the vessel not be in all respects ready for cargo at her loading place on or before the 18th of May, 1898, charterers or their agents have the option of cancelling this charter. If required by charterers, lay days are not to commence at loading port before the 5th of May, 1898.' Among the ship's papers was a bill of health issued by the consul of the United States at Antwerp, March 24, which described her as 'engaged in Atlantic trade, and plies between Antwerp, Cuba and the United States.' The bill of health concluded as follows: 'I certify that the vessel has complied with the rules and regulations made under the act of February 15, 1893, and that the vessel leaves this port bound for Pensacola, in the United States of America, via Havana, Santiago & Cienfuegos.' The steamer's freight list on the voyage to Cuban ports was valued at about $7000, stated to be barely sufficient to cover the expenses of receiving, transporting and delivering that cargo, and the charter hire on the contemplated voyage from Pensacola or Ship Island to Rotterdam would have been about $25,000.

The steamer arrived at Havana on April 17, and remained there for five days, discharging about sixteen hundred tons of her cargo, and taking on some twenty tons of general merchandise for Santiago. On April 22, at about half after three o'clock in the afternoon, she left Havana for Santiago, and at six o'clock, when about fifteen miles east of the Morro, at the entrance of Havana harbor, and five miles north of the Cuban coast, was captured by the cruiser New York, one of the blockading fleet, and sent to Key West in charge of a prize crew. There she was libelled on April 23.

In due course, proofs *in preparatorio*, which embraced the ship's papers and the depositions of her master and first officer, were taken. The master appeared in behalf of the owners and made claim to the vessel, and moved the court for leave to take further proofs, presenting with the motion his test affidavit. In the affidavit it was alleged that, although a majority of the stock of La Compañia La Flecha was registered in | the names of Spanish subjects and only a minority in the names of p. 362
British subjects, (members of the firm of G. H. Fletcher and Company,) one of the latter had possession of all the certificates of stock, which under the charter of the company established the ownership thereof, whereby he was the 'sole beneficial owner of the said steamer Pedro.' And further that the steamer was transferred from the British to the Spanish registry solely for commercial reasons, 'there being discriminations in favor of vessels carrying the Spanish flag in respect of commerce with the colonies of Spain, in consideration of dues paid by such steamers to the government of Spain,' but that it was the intention of the British stockholders to withdraw her from the Spanish registry and from under the Spanish flag, and restore her to the British registry and the flag of Great Britain whenever the trade might be disturbed. It was also alleged that the steamer was insured 'against all perils and adventures, including the risks of war, for her full value by underwriters of Lloyds, London, and by insurance companies organized and existing under and pursuant to the laws of Great Britain, and that if the said vessel should be condemned as prize by this court the loss will rest upon and be borne by the said English underwriters.'

The motion was denied, the cause heard on the pleadings and the proofs taken *in preparatorio*, and a decree of condemnation entered. Subsequently the Secretary of the Navy elected to take the vessel for the use of the United States pursuant to section 4624 of the Revised Statutes. By order of court she was duly appraised and delivered to the Navy Department, and the amount of her appraised value deposited with the Assistant Treasurer of the United States at New York, subject to the order of the District Court. From the decree of condemnation an appeal was prosecuted to this court.

Mr. Wilhelmus Mynderse for Bonet, claimant, appellant.

Mr. James H. Hayden for captors. *Mr. Joseph K. McCammon* was on his brief. |

p. 363 *Mr. Assistant Attorney General Hoyt* filed a brief for the United States.

MR. CHIEF JUSTICE FULLER delivered the opinion of the court.

When, on the twenty-second day of April, this Spanish steamer sailed from Havana, the United States and Spain were at war. Congress had adopted a resolution, April 20, demanding 'that the Government of Spain at once relinquish its authority and government in the Island of Cuba and withdraw its land and naval forces from Cuba and Cuban waters,' and directing and empowering the President 'to use the entire land and naval forces of the United States, and to call into the actual service of the United States the militia of the several States, to such extent as may be necessary to carry these resolutions into effect.' Time was given by the Executive until April 23 for Spain to signify compliance with the demand, but the Spanish Government at once, on April 21, recognized the resolution as 'an evident declaration of war,' and diplomatic relations were broken off. Blockade had been proclaimed April 22, and put into effective operation at Havana, and, immediately thereupon, elsewhere, under the proclamation. And by the act of Congress of April 25, it was declared that war had existed since the twenty-first day of April.

Being an enemy's vessel, the Pedro was liable to capture as lawful prize unless exempted therefrom by the terms of the proclamation of April 26. If that document in its bearing on this case could be regarded as ambiguous, a liberal construction might be indulged in, and it is urged that such liberality should in any event be accorded in view of the traditional policy of this Government in respect of the exemption of private property at sea during war.

In *The Phœnix*, 1 Spinks Eccl. & Adm. Rep. 306, 310; Spinks' Prize Cases, 1, 6, Dr. Lushington said in reference to the relaxation of belligerent rights by official action: 'If the words of the document are capable of

p. 364 two constructions, then | I am clearly of opinion that the one most favorable to the belligerent party, in whose favor the document is issued, ought to be adopted; but the court must bear in mind that its province is not *jus dare*, but *jus dicere;* and I must again refer to the principle which I have often enunciated in this court, *verbis plane expressis omnino standum est.*'

As applicable here, the meaning of the language used appears to us plain, and the proclamation not open to interpretation, since none is needed; nor are we justified in expanding executive action by construction because of the diplomatic attitude of this Government in respect of the exemption of all property, not contraband, of citizens and subjects of nations at war with each other, an exemption which has not as yet been adopted into the law of nations.

It may be that the hardships incident to the contrary view will finally be found so destitute of corresponding advantage as to lead to the general acceptance of the doctrine so long unsuccessfully advocated by our statesmen and publicists, in diminution of the evils of war, but we must apply the law as it is, and not the law as they have contended it should be.

The Pedro did not come within the fourth article of the proclamation, for she was in Havana, a port of the enemy, on April 21, and not 'in any port or place within the United States.' She sailed from Havana for Santiago, another port of the enemy, on April 22, was captured that day, and reached Key West on April 23 as a prize of war. The suggestion that she was thus brought within the exemption requires no remark.

Nor did the fifth article of the proclamation exempt the Pedro. That article provided that 'any Spanish merchant vessel which, prior to April 21, 1898, shall have sailed from any foreign port bound for any port or place in the United States, shall be permitted to enter such port or place and to discharge her cargo, and afterwards forthwith to depart without molestation.'

The Pedro remained in the harbor of Havana from the 17th until the 22d of April. We think it must be assumed that she was advised of the strained relations between the United States and Spain, and the imminency of hostilities. At all events, | she did not leave Havana until the p. 365
day after that designated by Congress and the President as the day on which war actually began, and which was also so regarded by the Government of Spain. She had no cargo to be discharged at any port or place in the United States, but had cargo for Santiago and Cienfuegos, Cuban ports held by the Spanish forces, and she cleared, not for Pensacola, but for Santiago. She was not within the letter of the proclamation, nor within the reasons usually assigned for the exemption as pointed out in the opinion of the District Judge, 87 Fed. Rep. 927. She had not left a foreign port in ignorance of the perilous condition of affairs, and innocently taking a course which would subject her to our power by entering one of our ports. Neither was she bringing cargo to this country for the increase of our resources, or the convenience of our citizens. On the contrary, she was sailing from one port to another port of the enemy, and all the cargo she had on board was destined for the enemy's ports. Not only this, but she took on cargo at Havana for Santiago, and was captured while thus actually trading from one enemy port to another enemy port, being herself an enemy vessel. In these circumstances the fact that the Pedro was under contract to ultimately proceed, after concluding her visits to the Spanish ports, to a port of the United States, to there load for Europe, did not bring her within the exemption of the proclamation.

The doctrine as to continuity of voyage as laid down by this court in the cases cited by appellant has no application.

In *The Circassian*, 2 Wall. 135, it was ruled that the intent to violate a blockade, found as a fact, was not disproved by evidence of a purpose to call at a neutral port, not reached at time of capture, with ulterior destination to the blockaded port. In *The Bermuda*, 3 Wall. 514, the actual destination to a belligerent port, whether ulterior or direct, was held to determine the character of the transaction as a whole; that transhipment could not change the effect of the pursuit of a common object by a common plan; and that if the cargo was contraband its condemnation was justified, whether the voyage was to ports blockaded
p. 366 or to ports not blockaded; and so | as to the vessel in the former case. And in *The Springbok*, 5 Wall. 1, it was held that an intention to tranship cargo at a neutral port did not save it when destined for a blockaded port; that as to cargo, both in law and intent, the voyage from London to the blockaded port was one voyage, and that the liability attached from the time of sailing if captured during any part of that voyage. The solution of the question under consideration is not particularly aided by these and like decisions relating to blockade running and the transportation of contraband.

In *The Joseph*, 8 Cranch, 451, the American brig Joseph sailed from Boston with a cargo on freight April 6, 1812, on a voyage to Liverpool, and the north of Europe, and thence directly or indirectly to the United States. She discharged her cargo at Liverpool; then, under British license, she took a cargo from Hull to St. Petersburg, and there received news of the war between the United States and Great Britain. She afterwards sailed from St. Petersburg to London with a cargo consigned to merchants at that port, having delivered which, she sailed for the United States in ballast, and was captured not far from Boston Light, and sent into port for adjudication. Her trading with the enemy rendered her liable to condemnation as prize; but it was contended that the offensive voyage terminated at London, and that she was not taken *in delicto*. The court held, however, that whether her voyage were considered an entire one from the United States to England, thence to St. Petersburg, and thence to the United States, or as two distinct voyages, the homeward voyage being from St. Petersburg to the United States, with a deviation to London, she was captured during the same voyage in which the offence was committed, though after it was committed, and was still *in delicto*.

The Argo, 1 Spinks, 375; Spinks' Prize Cases, 52, so much relied on by counsel, was an entirely different case from that presented by this record. The Argo was a vessel belonging to a Russian owner, sailing under Russian colors, and bound on a voyage from Havana to Cork.

Her charter party bore date February 7 at Havana, but it was therein stipulated that | she should load at Havana or Matanzas, demurrage not p. 367
to be paid for forty-two running days. She took on sufficient ballast at Havana to keep her safe, and left there in February for Matanzas, where her cargo was begun to be put on board February 28 and was completed on March 30, and she cleared from that port April 2. March 29, 1854, the British Order in Council printed in the margin [1] was issued. Dr. Lushington, adhering to the views he had expressed in *The Phœnix*, *supra*, held that the order did not contemplate that the vessel should be *laden* at the date of sailing and that the voyage was commenced at Havana to end in Great Britain, notwithstanding she took cargo at Matanzas.

It was argued that the Pedro was not liable to capture and condemnation because British subjects were the legal owners of some and the equitable owners of the rest of the stock of La Compañia La Flecha, and because the vessel was insured against risks of war by British underwriters. But the Pedro was owned by a corporation incorporated under the laws of Spain; had a Spanish registry; was sailing under a Spanish | p. 368
flag and a Spanish license; and was officered and manned by Spaniards. Nothing is better settled than that she must, under such circumstances, be deemed to be a Spanish ship and to be dealt with accordingly. Story on Prize Courts (Pratt's Ed.) 60, 66, and cases cited. *The Friendschaft*, 4 Wheat. 105; *The Ariadne*, 2 Wheat. 143; *The Cheshire*, 3 Wall. 231; Hall Int. Law, § 169.

These stockholders were in no position to deny that when they elected to take the benefit of Spanish navigation laws and the commercial profits to be derived through discriminations thereunder against ships of other nations, they also elected to rely on the protection furnished by the Spanish flag. Nor can the alleged intention to restore the Pedro to

[1] 'Her Majesty, being compelled to declare war against His Imperial Majesty the Emperor of all the Russias, and being desirous to lessen as much as possible the evils thereof is pleased by and with the advice of her Privy Council, to order, and it is hereby ordered, that Russian merchant vessels, in any ports or places within her Majesty's dominions shall be allowed until the tenth day of May next, six weeks from the date hereof, for loading their cargoes and departing from such ports or places; and that such Russian merchant vessels, if met at sea by any of her Majesty's ships, shall be permitted to continue their voyage, if on examination of their papers it shall appear that their cargoes were taken on before the expiration of the above term: Provided, that nothing herein contained shall extend to or be taken to extend to Russian vessels having on board any officer in the military or naval service of the enemy, or any article prohibited or contraband of war, or any despatch of or to the Russian Government.

'And it is hereby further ordered by her Majesty, by and with the advice of her Privy Council as aforesaid, that any Russian merchant vessel which, prior to the date of this order, shall have sailed from any foreign port bound for any port or place in her Majesty's dominions, shall be permitted to enter such port or place, and to discharge her cargo, and afterwards forthwith to depart without molestation; and that any such vessel, if met at sea by any of her Majesty's ships shall be permitted to continue her voyage to any port not blockaded.'

British registry, if war rendered the change desirable, be regarded. That had not been done when the Pedro was captured.

In conclusion, we are of opinion that the court below did not err in refusing to allow further proofs to be taken. The Spanish ownership was made out, and the facts that the stock of the corporation belonged legally or equitably to British subjects or that the loss of the vessel would be eventually borne by British underwriters were immaterial. Nor was there any doubt as to the movements of the Pedro and the trading in which she was actually engaged. The conclusion reached by the District Court could not have been affected by the further proofs desired to be taken.

Decree affirmed.

MR. JUSTICE WHITE, with whom concurred MR. JUSTICE BREWER, MR. JUSTICE SHIRAS and MR. JUSTICE PECKHAM, dissenting.

The Pedro was a British-built ship, formerly owned and registered in Great Britain. About nine years prior to the 22d day of April, 1898, on which day the ship was captured, she was transferred to a Spanish corporation, took a license from the Spanish Government, and thereafter sailed under the Spanish flag. From the time when she thus became |
p. 369 a Spanish merchant vessel she followed a course of regular trade by sailing from some port or ports in Europe to some port or ports in the southern part of the United States, touching in so doing at several places in the Island of Cuba. Voyages of this kind were made for about nine years prior to the capture, the vessel usually consuming about three months in both the outward and return voyage, being thus able to make four trips each year between a European port and a port in the United States. On these voyages, as illustrated by the one on which she was engaged when captured, the business secured for the Cuban ports was accessory to the main object of the voyage, which was the procuring of a remunerative cargo in the United States. Prior to the journey to the United States, upon which she was captured, the Pedro had last been at the port of New Orleans in January, 1898, at which time she there paid the tonnage tax imposed by the act of Congress, the payment then made being the fourth for the year beginning March 2, 1897, showing that for the year prior to her capture she had been four times in a port of the United States and paid tonnage at such ports.

The Pedro, being in the port of Antwerp in March, 1898, took cargo for Havana, Santiago and Cienfuegos, in the island of Cuba. Whilst the vessel was thus at Antwerp taking cargo for the Cuban ports in question, she was, on the 18th of March, 1898, through brokers at Liverpool, chartered by W. S. Keyser & Co., a firm of merchants established in Mobile and Pensacola, to proceed to Pensacola or Ship Island in the United States '*with all convenient speed*,' there to take a cargo of lumber to be carried on the return voyage to Rotterdam. The opening clause

of the charter described the vessel as now loading in Antwerp for Cuba, and the contract contained the stipulations usual to such agreements. It was provided that the charterers should not be obliged to commence loading the ship at Pensacola or Ship Island before the 5th of May, but that the loading should be completed in sixteen working days, and that if the vessel did not arrive at her point of destination in the United States on or before the 18th day of May, 1898, the charterers should have the | option of cancelling the contract. Although the vessel had a capacity of p. 370
about five thousand tons measurement, the cargo which was taken at Antwerp for the Cuban ports was only about two thousand tons, less than half her capacity, and the entire freight on such cargo did not exceed seven thousand dollars, which was barely sufficient to meet the expense of receiving, transporting and delivering. On the other hand, the freight on the lumber to be taken at either the port of Pensacola or Ship Island, at the rates fixed in the charter party, would have amounted to about twenty-five thousand dollars. The ship sailed on her voyage on the 25th of March, 1898. Before doing so she took from the American consul at the port of Antwerp a bill of health as required by the laws of the United States. In this bill of health the vessel was described as one 'engaged in Atlantic trade, and plies between Antwerp, Cuba and the United States;' and the consul besides certified that the 'vessel has complied with the rules and regulations made under the act of February the 15th, 1893, and that the vessel leaves this port bound for Pensacola in the United States of America via Havana, Santiago and Cienfuegos.' She arrived at Havana on the 17th of April, 1898, and there discharged about sixteen hundred tons of her cargo. On the 20th of April she received from the steamer Alava, in the port of Havana, about twenty tons of general cargo destined for Santiago, which the latter vessel had brought from European ports and desired to tranship, the same never having been landed in Cuba. In the afternoon of April 22d the steamer left Havana in continuance of her voyage. On that morning, in execution of an order received from the President, the American fleet left Key West for the Island of Cuba to establish and enforce a blockade of certain ports in the Island of Cuba which had been proclaimed by the President. The Pedro, some distance outside of the harbor of Havana, met the American fleet and was captured.

There is no just foundation, however, for the contention that in leaving the port of Havana the vessel was violating the blockade, for at the time of her sailing the blockade had not | been established. Indeed, p. 371
when the capture took place the fleet was on its way to Havana for the very purpose of initiating the blockade ordered by the proclamation of the President. Whilst it is true that subsequently to the 22d of April Congress passed a resolution declaring that war should be considered as having

been flagrant as of the date of the 21st of April, that it was not conceived or known when the vessel sailed from Havana on the 22d that a state of war existed is also demonstrated by the proof, which shows that just prior to the sailing of the Pedro from the harbor of Havana an American ship was allowed to depart from that port, and that shortly after the Pedro left an American steamer, which was likewise in the port of Havana, was also permitted to leave.

Under this state of fact it seems to me that the Pedro was within the exact requirements of the fifth article of the proclamation of the President of the United States, and hence was not subject to capture and condemnation. The article in question is as follows :

' 5. Any Spanish merchant vessel which prior to April 21, 1898, shall have sailed from any foreign port bound for any port or place in the United States, shall be permitted to enter such port or place, and to discharge her cargo, and afterwards forthwith to depart without molestation ; and any such vessel, if met at sea by any United States ship, shall be permitted to continue her voyage to any port not blockaded.'

The theory from which it is deduced that the Pedro was not a Spanish merchant vessel ' which prior to April 21, 1898,' had ' sailed from any foreign port bound for any port or place in the United States,' is not by me understood. She assuredly sailed from Antwerp prior to the 21st of April, 1898 ; she certainly was bound for a port in the United States, since she was under a charter to American citizens, by the terms of which she was obliged ' to proceed with all convenient speed ' so as to arrive at Pensacola or Ship Island by May 5, 1898, where she was to take on an American cargo to be carried to the port of Rotterdam. The vessel beyond question took a bill of health from the American consul at Antwerp, describing her as one engaged in Atlantic trade, and plying between |
p. 372 Europe and the United States, and the American consul certified that she was leaving the port of Antwerp bound for Pensacola in the United States via Havana, Santiago and Cienfuegos. Under these conditions she came, in my conception, not only within the letter of the fifth article of the proclamation, but also within its plain intent. The object of the proclamation was to relieve Spanish merchant vessels coming in the regular course of a commercial voyage to our ports from, without warning and without opportunity of returning to a port of safety, being captured and condemned as prize of war in consequence of the breaking out of hostilities subsequent to the inception of the voyage which the vessel was engaged in prosecuting. In this respect the proclamation was but a practical execution of the enlightened policy by which civilized countries, on the breaking out of hostilities, have relieved merchant vessels, coming to one or the other of the belligerent countries, from being subject to capture when, before the happening of war, they had undertaken a lawful

voyage in the prosecution of purely commercial duties and relations. The scope of the proclamation is shown by a consideration of the fourth and the fifth clauses together, the one providing for the right of an enemy's vessel found in a port of the United States at a time covered by the clause, to load cargo and depart without molestation, even although bound to a port of the enemy, and the provision of the fifth article which protects from seizure and condemnation the merchant vessels of the enemy which had sailed bound for any port of the United States prior to the period mentioned in the proclamation.

But, it is said, when the Pedro left Havana on the afternoon of the 22d she was not bound for Ship Island or Pensacola in the United States, but was bound for Santiago, therefore she was on a voyage between two ports of the enemy, and was not within the fifth article of the proclamation. This, however, treats the voyage from Havana to Santiago as a new and wholly independent one from that which commenced at Antwerp. It disregards the fact that the vessel had sailed from Antwerp for Pensacola or Ship Island via Havana and the other ports named ; it overlooks that the ship was under | express charter to American citizens, when she p. 373
left Antwerp, to proceed to Pensacola or Ship Island, and it further ignores the certification by the consul already referred to. To treat the voyage from Havana to Santiago as a new and independent one, moreover, fails to give weight to the proof showing that the touching at the Spanish ports in the Island of Cuba was merely incidental to the main voyage from Antwerp to the United States. It also does not apply the cumulative proof arising from the long and regular course of business in which the ship had been engaged for nine years prior to her capture in making regular trips from ports in Europe to ports in the United States via designated ports in the Island of Cuba. The decisions of this court, also, I think, refute the contention that the ultimate termination of an outward voyage may be disregarded, in order to create a new voyage because of the touching of a vessel at an intermediate port. The rule, consecrated by the previous decisions of this court, according to my understanding, is that the real intention of a vessel as to her outward bound port is the determining factor in concluding whether in consequence of her voyage she is or is not subject to capture as lawful prize. In *The Joseph*, 8 Cranch, 451, 454, 455, the vessel being a merchant vessel of the United States, with full knowledge of the war (1812) between the United States and England, carried a cargo from St. Petersburg to London. After discharging the cargo at the latter point she started in ballast for New York, her home port, and was captured and proceeded against for the offence of trading with the enemy. The defence was that the voyage had terminated on the arrival of the vessel in London, and that from London to the United States she was on a new voyage, and therefore not subject

to capture and condemnation for an offence committed on a previous voyage. The court, through Mr. Justice Washington, said :

' It is not denied that if she be taken during the same voyage in which the offence was committed, though after it was committed, she is considered as being still *in delicto*, and subject to confiscation ; but it is contended that her voyage ended at London, and that she was on her
p. 374 return embarked | on a new voyage. This position is directly contrary to the facts in the case. The voyage was an entire one from the United States to England ; thence to the north of Europe ; and thence, directly or indirectly, to the United States. Even admit that the outward and homeward voyages could be separated so as to render them two distinct voyages, which is not conceded, still it cannot be denied that the termini of the homeward voyage were St. Petersburg and the United States. . . . It was, in short, a voyage from St. Petersburg to the United States by way of London.'

In *The Circassian*, 2 Wall. 135, a vessel sailing from one neutral port directly to another port of the same character was condemned, because it was found that the real and ultimate destination of the ship was a blockaded port in the United States. In *The Bermuda*, 3 Wall. 514, a vessel with cargo from one neutral port to another neutral port was condemned, as it was held that the real object of the voyage was to transport contraband of war by the vessel from one neutral port to the other with the object and purpose of continuing the transportation from the neutral port, to which the vessel was consigned, into the United States through the lines of a lawfully established blockade, the court deciding that the real purpose and intent as to the ultimate destination of the ship and its contraband cargo should control in determining the legality of the capture. In speaking on the subject, through Mr. Chief Justice Chase, the court said (p. 553) :

' It makes no difference whether the destination to the rebel port was ulterior or direct ; nor could the question of destination be affected by transhipment at Nassau, if transhipment was intended, for that could not break the continuity of transportation of the cargo. The interposition of a neutral port between neutral departure and belligerent destination has always been a favorite resort of contraband carriers and blockade runners. But it never avails them when the ultimate destination is ascertained. A transportation from one point to another remains continuous, so long as intent remains unchanged, no matter what stoppage or transhipment intervene.' |
p. 375 Applications of this doctrine are contained in the following cases : *The Hart*, 3 Wall. 559 ; *The Springbok*, 5 Wall. 1 ; *The Peterhoff*, 5 Wall. 28. I do not understand that in the opinion of the court now announced the cases just cited have been overruled. They stand, therefore, and must be reconciled with the decision made in this case. This being so, the

doctrine, from my point of view, may now be thus summed up. Where there is a question as to the condemnation of a vessel as lawful prize, the fact that, between her point of departure and her point of ultimate destination, she has touched or unladen her cargo or a portion thereof at an intermediary port, will not be considered as breaking the continuity of the voyage or as destroying the ulterior destination, and therefore if that destination be unlawful the voyage will be continuous from the point of departure to such ulterior destination, and the vessel will consequently be condemned. These rules are subject to the following exceptions: Where it becomes necessary to disregard the foregoing principles as to ulterior destination they will be given no weight, and the voyage will be treated as having terminated at an intermediary point, and consequently the vessel will be condemned because the voyage was not continuous. The result being, in any event, to subject the vessel to condemnation.

It is, however, urged, conceding that the ultimate destination controls, and therefore that the stoppage at the intermediary port was of no consequence, as under the charter party the Pedro was bound to proceed to Pensacola, there to take on a cargo, to be delivered at Rotterdam, even under the doctrine of continuous voyage, her voyage must be treated as continuous from Antwerp via Havana, etc., to Pensacola, thence to Rotterdam; that is to say, the continuous voyage, as manifested by the charter party, was from Antwerp to Rotterdam via Pensacola, hence the ship was never bound for the United States. But this obliterates the manifest distinction between the outward and return voyage, which is apparent in the text of the fifth article of the proclamation.

Even conceding that from some points of view the round voyage, that is, both the outward and return trip, should be | considered as being p. 376
continuous, such concession cannot in reason be the test for determining whether under the proclamation the vessel was *bound* for the United States. If it be held that both the inward and the outward voyage are to be taken under the proclamation as the criterion for determining whether a vessel was bound for the United States, it would follow that the proclamation had no relation whatever to any foreign ship, other than such a ship bound to a port of the United States without the intention of departing, that is, with the intention of remaining in the port of the United States. The proclamation, however, provides that the vessels bound for the United States to which it refers 'shall be permitted to enter such port or place, and to discharge her cargo, and afterward forthwith to depart without molestation; and any such vessel, if met at sea by any United States ship, shall be permitted to continue her voyage to any port not blockaded.' This plainly distinguishes between the voyage on which the vessel is bound for the port of the United States and the voyage to be undertaken by the vessel from the port of the United States to which she

is bound back to her homeward or some other neutral port. To construe the proclamation so as to cause it to embrace only vessels bound for the United States without any purpose of thereafter departing, would exclude from its operation the entire class of vessels it was its purpose to protect from condemnation. The error of such a consideration becomes to my mind plain, especially when it is borne in mind that it is conceded on all sides that the proclamation should receive a liberal construction in favor of the public purpose which it embodies, and against the liability of innocent and unwarned private property to capture and condemnation.

It was strenuously argued at bar, and, as I understand the opinion of the court, it is now held, that the Pedro was not embraced within the fifth article of the proclamation because she did not have cargo for the United States. The object of the fifth clause of the proclamation, it was said, was to allow vessels with cargo bound for the United States to be free from capture, because it was the public policy of the United States,
p. 377 on the outbreak of war, to encourage the bringing in | of cargo. The text of the proclamation does not, however, support this contention. It declares that all vessels which ' have sailed from any foreign port bound for any port or place in the United States shall be permitted to enter such port or place. . . .' It does not say all vessels which have sailed with cargo, but that all vessels shall be so permitted. True it is that the proclamation also authorizes the vessel thus permitted to enter to discharge her cargo. But the mere adding to the permission to enter, the right to discharge cargo, cannot be taken as denying permission to enter, if there be no cargo to discharge. It cannot in any event be said that the proclamation in plain terms confers the privilege of safe entry only on vessels having cargo ; and if it does not, then construction is required, and the rule is that a liberal construction must be applied in order to protect the innocent private vessel from capture and condemnation. This supposed theory of the desire to encourage the bringing in of cargo, upon which it is assumed that the fifth article of the proclamation rests, entirely discards or at least ignores the enlightened moral sense which the proclamation embodies, that is, the duty not to capture without warning merchant vessels bound to our shores previous to the outbreak of war, and substitutes for it what to me seems the sordid motive of a supposed gain to result from incoming cargo. In other words, in its last analysis, the contention that the proclamation contemplates only exempting a vessel from seizure which has cargo for the United States, really asserts that fair dealing and justice are embodied in the proclamation only so far as it was deemed that profit might be derived from being just, and no further. Such an interpretation of the proclamation, however, is refuted by its very terms, since its preamble declares that its object was to mitigate the wrongs of war in accordance with the practice pursued by enlightened

and civilized nations. Aside from these considerations, the supposed advantage to be derived from allowing cargo to come in, when considered intrinsically, is without force. Under this theory, two vessels would depart on the same day from a foreign port ; one bound to a port in the United States, with | cargo, under a charter to foreign citizens to convey p. 378
their goods into this country ; the second ship proceeding in ballast under charter to American citizens to proceed to the United States and there take cargo. The argument is that the vessel chartered to the foreigner and containing his goods in the execution of his contract would be exempt from capture, whilst the vessel sailing in order to carry out the contract made with and in favor of an American citizen would be subject to capture. But this contention as to cargo is not only in conflict with the text of the fifth article, but is also at war with another provision of the proclamation —that is, the fourth article. By that article a Spanish vessel found in a port of the United States, as therein stated, is not only allowed to depart, but is also accorded the privilege of taking on cargo and carrying it either to a neutral port or to a port of the enemy, if not blockaded, up to a stated date without molestation. But the language conferring the privilege of loading cargo contained in the fourth article, whilst really only permissive, must be construed as imperative, if the permissive privilege to discharge cargo in the fifth article be held an imperative one, for no distinction can be drawn between the two. The argument then comes to this, that the public policy of the proclamation deemed the coming in of cargo so important that it provided for the capture of all vessels sailing for ports of the United States prior to the commencement of war, if they did not have cargo, and that the same public policy considered the taking away of cargo from the United States so important that the privilege given in the fourth article to Spanish merchant vessels in our ports to depart could be availed of, provided only they took cargo away from the United States. An interpretation which gives rise to so unreasonable a contradiction seems to me to demonstrate its own unsoundness.

But all the considerations which are relied on as justifying the condemnation in this case seem to me to be fully answered by authority. Both the fourth and fifth articles of the proclamation of the President were almost word for word a reproduction of the British Order in Council of March 29, 1854, | issued at the outbreak of the Crimean war. In order p. 379
that the identity of the two may be at once apparent they are both reproduced, in juxtaposition, in the margin.[1]

[1] *President's Proclamation of April 26, 1898* (30 U.S. Statutes at Large, 1770).

4. Spanish merchant vessels, in any ports or places within the United States, shall be allowed till May 21, 1898, inclusive, for loading their cargoes and departing from such ports

Order in Council, March 29, 1854 (*Spinks Prize Cases, Appendix iii*).

Russian merchant vessels, in any ports or places within her Majesty's dominions, shall be allowed until the tenth day of May next, six weeks from the date hereof, for loading their

Under the Order in Council just alluded to, the Argo, a Russian vessel, and therefore a vessel of the enemy, sailed from Havana for Matanzas,
p. 380 Cuba, there to take on cargo for | Great Britain. The departure of the vessel from Havana in ballast was prior to the date fixed by the Order in Council. After arriving at Matanzas she there took on cargo, and sailed from that port for Great Britain, subsequent to the date fixed in the Order in Council. She was captured, and the question of her condemnation was considered and decided by Dr. Lushington. It was held that the vessel was protected by the Order in Council, and she was released. Necessarily, under the facts stated, the ultimate end of the outward voyage to Great Britain, and not the intermediary port at which the Argo stopped, controlled; otherwise she would have been subject to condemnation. This follows, as the order in terms only protected Russian merchant vessels which had sailed prior to the date of the order. As the sailing for Great Britain from Matanzas was subsequent to the order, it necessarily results that the date of sailing relied upon as protecting was the date of the sailing from Havana, and not the subsequent departure from the intermediate port. So, also, the case necessarily decided that the presence of cargo was not essential to entitle the vessel to protection under the Order in Council, since the vessel sailed in ballast from Havana, and only departed from Matanzas, where the cargo was taken on, after the date of the order, and therefore at a time and under conditions which would not have protected her unless the antecedent

or places; and such Spanish merchant vessels, if met at sea by any United States ship, shall be permitted to continue their voyage, if, on examination of their papers, it shall appear that their cargoes were taken on board before the expiration of the above term; Provided, that nothing herein contained shall apply to Spanish vessels having on board any officer in the military or naval service of the enemy, or any coal (except such as may be necessary for their voyage), or any other article prohibited or contraband of war, or any dispatch of or to the Spanish Government.

5. Any Spanish merchant vessel which prior to April 21, 1898, shall have sailed from any foreign port bound for any port or place in the United States, shall be permitted to enter such port or place, and to discharge her cargo, and afterwards forthwith to depart without molestation; and any such vessel, if met at sea by any United States ship, shall be permitted to continue her voyage to any port not blockaded.

cargoes and departing from such ports or places; and such Russian merchant vessels, if met at sea by any of her Majesty's ships, shall be permitted to continue their voyage, if on examination of their papers it shall appear that their cargoes were taken on board before the expiration of the above term; Provided, that nothing herein contained shall extend to or be taken to extend to Russian vessels having on board any officer in the military or naval service of the enemy, or any article prohibited or contraband of war, or any dispatch of or to the Russian Government.

. . . . . .

Any Russian merchant vessel which, prior to the date of this order, shall have sailed from any foreign port bound for any port or place in her Majesty's dominions, shall be permitted to enter such port or place and to discharge her cargo, and afterwards forthwith to depart without molestation; and any such vessel, if met at sea by any of her Majesty's ships, shall be permitted to continue her voyage to any port not blockaded.

conditions existing at the time of the sailing had been considered as determinative.

The language of Dr. Lushington, in passing upon the case, is to my mind so persuasive of the issues which arise upon this record, that I quote from it. He said (Spink's Prize Cases, p. 53) :

' This vessel did sail from the Havannah prior to the date of the Order ; she sailed from Matanzas subsequently to the date of the Order. When she left the Havannah she was in ballast bound for Cork, according to the charter party.

' It has been contended that this Order in Council contemplated that the Russian vessel should have been laden at the date of the Order ; but I find no words in the Order that would justify my putting so strict a construction upon it ; | neither do I think that there are any words p. 381
which impose the necessity of not touching at or taking a cargo at some other port than that where the voyage commenced. For instance, I apprehend that a vessel might have taken in a part of her cargo from one foreign port, having left that port prior to the 29th of March, and taken in another part of the cargo at another foreign port subsequently.

' The real meaning of the Order in Council, according to my view of it, is, that the vessel shall have sailed prior to the 29th of March, on a voyage to end in Great Britain, and I am clearly of opinion that this was one continuous voyage, the commencement of which was at the Havannah, and that the sailing from Havannah prior to March the 29th is a substantial compliance with the terms of the Order.'

Some stress was laid in argument, and seems to be given weight in the opinion of the court, to the language of Dr. Lushington referring to the taking on of the cargo. But, clearly, from the text of his opinion, this language was used in relation to the argument presented to him, which was that although a vessel sailing in ballast, without cargo, prior to the date of the Order in Council, was admittedly within its purview, the Argo was not covered by it, because subsequent to the proclamation she took on her cargo at an intermediate port. In meeting this argument the question of cargo was referred to, and the whole purport of the Order was summed up in language which I again quote. It was as follows :

' The real meaning of the Order in Council, according to my view of it, is, that the vessel shall have sailed prior to the 29th of March, on a voyage to end in Great Britain, and I am clearly of opinion that this was one continuous voyage, the commencement of which was at the Havannah, and that the sailing from Havannah prior to March the 29th is a substantial compliance with the terms of the Order.'

The sailing from Havana, thus decided to have been sufficient, I again remark, was in ballast and without cargo.

This construction of the Order in Council, I have said, should be

persuasive, indeed, if it should not be held to have been adopted and
p. 382 ratified by the reproduction in the proclamation | of the President of the very language of the Order in Council, so many years after that order had been thus construed by the British Admiralty tribunal.

Thinking that the condemnation of this ship under the circumstances disclosed by the record will subject innocent private property to condemnation without just cause, will deprive it of the protection afforded by the proclamation of the President, which, according to its terms, but carried out those commendable principles of honesty and humanity, enforced by all civilized nations on the outbreak of war, I am constrained to dissent.

The Guido.

(175 U.S. Reports, 382) 1899.

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE SOUTHERN DISTRICT OF FLORIDA.

No. 122. Argued November 3, 1899.—Decided December 11, 1899.

This was an appeal from a decree condemning the Guido as prize of war. On the facts, concisely stated in the opinion of the court, it is *held* following *The Pedro*, *ante*, that the case was properly disposed of below.

THE statement of the case will be found in the opinion of the court.

Wilhelmus Mynderse for Julian de Ormaechea, claimant and appellant.

Mr. James H. Hayden for the captors. *Mr. Joseph K. McCammon* was with him on the brief.

Mr. Assistant Attorney General Hoyt filed a brief for the United States.

Mr. George A. King and *Mr. William B. King* filed a brief for certain captors. |

p. 383 MR. CHIEF JUSTICE FULLER delivered the opinion of the court.

This is an appeal from a decree of the District Court of the United States for the Southern District of Florida condemning the steamer Guido as prize of war.

The Guido belonged to La Compañia La Flecha, a Spanish corporation of Bilboa, Spain, and sailed under Spanish registry and the Spanish flag, having a royal patent from the Crown of Spain, and being officered and manned by Spanish subjects. Her voyage began at Liverpool, whence she proceeded to Santander, Corunna and La Puebla, Spain. At Liverpool and at each of the Spanish ports she took on cargo consisting principally of food supplies, all shipped to Havana and Cuban ports. It had been her custom to carry cargo from Spanish and other European ports to Cuba, and then proceed to some port of the United States for a return cargo of lumber, and it was her intention on this occasion to do this, but she had no charter or specific engagement, so far as appeared, for the continuation of her voyage after discharging in Cuba. It was certified in her bill of

health issued at Liverpool 'that the vessel has complied with the rules and regulations made under the act of February 15, 1893, and that the vessel leaves this port bound for a port (unknown) in the United States of America, via Spain & Cuba ports (unknown).'

The steamer cleared from La Puebla for Havana April 10, and was captured April 27 about seventy miles to the eastward of Havana, and sent to Key West in charge of a prize crew. She was there libelled and proofs *in preparatorio* were taken. The master appeared on behalf of the owner and asserted claim to the vessel, and moved for leave to take further proofs in respect of matters set forth in his test affidavit therewith filed, which motion was denied. The averments of the affidavits corresponded with those in the case of the *Pedro*.

We are of the opinion that the case was properly disposed of, and the decree of the District Court is

Affirmed.

Mr. Justice Shiras, Mr. Justice White and Mr. Justice Peckham dissented.

The Buena Ventura.

(175 U.S. Reports, 384) 1899.

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE SOUTHERN DISTRICT OF FLORIDA.

No. 106. Argued November 1, 2, 1899.—Decided December 11, 1899.

In the fourth clause of the President's proclamation of April 26, 1898, issued after the declaration of war against Spain by Congress, April 25, 1898, it was said: '4. Spanish merchant vessels in any ports or places within the United States, shall be allowed till May 21, 1898, inclusive, for loading their cargoes and departing from such ports or places, and such Spanish merchant vessels, if met at sea by any United States ship, shall be permitted to continue their voyage if, on examination of their papers, it shall appear that their cargoes were taken on board before the expiration of the above term; *provided*, that nothing herein contained shall apply to Spanish vessels having on board any officer in the military or naval service of the enemy, or any coal (except such as may be necessary for their voyage), or any other article prohibited or contraband of war, or any dispatch of or to the Spanish Government.' The Buena Ventura, a Spanish vessel, being at Cuba in March, 1898, was chartered to proceed with all convenient speed to Ship Island, Mississippi, and there to take on board a cargo of lumber for Rotterdam. Under this charter she arrived at Ship Island in the latter part of March, 1898, and took on a cargo of lumber for Rotterdam. She cleared at the custom house on the 14th of April accordingly, but was detained by low water until April 19, when, between 8 and 9 A.M. she proceeded on her voyage. While so proceeding she was captured by a man of war of the United States about ten miles off the Florida coast. Up to the moment of capture all her officers were ignorant of the existence of a state of war, and the vessel, at the time of her capture, was following the ordinary course of her voyage. After hearing in the District Court of the United States the Buena Ventura was condemned and sold under a decree of court, and the proceeds were deposited to abide the event of an appeal from that decree.

Held ;

(1) That an innocent vessel like the Buena Ventura, which had loaded within a port of the United States, and had sailed therefrom before the commencement of the war, was entitled, under the proclamation, to continue its voyage, that being clearly within the intention of the President, under the liberal construction which this court is bound to give to that document ;

(2) That the reversal of the judgment below, condemning the Buena Ventura, should be without costs or damages in her favor ;

(3) That the moneys arising from the sale of the vessel must be paid to the claimant, deducting only the expenses properly incident to her custody and preservation up to the time of sale. |

p. 385 During the late war between the United States and Spain, and on May 27, 1898, the District Court of the United States for the Southern District of Florida condemned the steamship Buena Ventura as lawful prize of war, on the ground ' that the said steamship Buena Ventura was enemy's property, and was upon the high seas and not in any port or place of the United States upon the outbreak of the war, and was liable to condemnation and seizure.' It was thereupon ordered that the vessel ' be condemned and forfeited to the United States as lawful prize of war ; but it appearing that the cargo of said steamer was the property of neutrals and not contraband and subject to condemnation and forfeiture, it is ordered that said cargo be released and restored to the claimant or the true and lawful owners thereof.'

The vessel was captured on April 22, 1898, eight or nine miles from Sand Key light, on the Florida coast, by the United States ship of war Nashville, under the command of a line officer of the United States Navy, was brought into the port of Key West for adjudication, and was condemned upon the answers, given by the master and mate of the steamship, to standing interrogatories *in preparatorio*, and upon the documents seized on board the ship by the captors. This evidence showed that the steamship was a Spanish vessel engaged exclusively in the carrying of cargoes, and that at the time of her capture she was making a voyage under a charter party which had been concluded in Liverpool on March 23, 1898, between the agents of the owners and the agents of the charterers. By this charter party the steamship was described as ' now ready to leave Cuba ; ' and it was agreed upon therein that the vessel should with all convenient speed proceed to Ship Island, Mississippi, and there take on a cargo of lumber, and proceed therewith, as customary, to Rotterdam. The vessel was to be at her loading place and ready for cargo on or before the 10th of April, and if she were not, the charterers had the option of cancelling the charter. Pursuant to this charter party the ship left Cuba and arrived at Ship Island about the 31st of March, and between that time and the 19th of April she had
p. 386 taken on her cargo, and on the | latter day had sailed from Ship Island bound for Norfolk, Virginia, to take in bunker coal, the charter party

giving the vessel the liberty to stop at any port on the voyage for coal, then to proceed to Rotterdam. After leaving port at Ship Island she proceeded on her voyage to Norfolk, and about half-past seven o'clock on the morning of April 22, while proceeding close to the Florida reefs, was captured as stated. She made no resistance at the time of her capture, there were no military or naval officers on board of her, and she carried no arms or munitions of war. The evidence is undisputed that the vessel, when captured, was proceeding on her voyage to Norfolk.

Previous to sailing from Ship Island she was furnished with a bill of health, in which it was stated that she was now 'ready to depart from the port of Pascagoula, Mississippi, [which is the customs port of Ship Island,] for Norfolk, Virginia, and other places beyond the sea.' Her manifest showed that she was bound for Norfolk. It is headed 'Coast Manifest,' and after a description of the cargo it continues: 'Permission is hereby granted to said vessel to proceed from this port to Norfolk, in the district of Norfolk and State of Virginia, to lade bunker coal;' and it was signed and sealed by the deputy collector of Pascagoula, district of Pearl River, Mississippi, on April 14, 1898, and the fees therefor paid.

The ship's clearance was for Norfolk, and contained the same permission to proceed there, to lade bunker coal.

There was no evidence which tended to throw any suspicion as to the destination of the vessel.

After obtaining all of her papers in the regular way, and having cleared at the custom house on April 14, 1898, she was detained at Ship Island by low water until between eight and nine o'clock A.M. of April 19, 1898, when she sailed over the bar and proceeded on her voyage.

In the test affidavit of the master he swore that at all times before the ship's seizure he and all of his officers were ignorant that war existed between Spain and the United States, and the vessel at the time of her capture was following the ordinary course of her voyage. |

The various proceedings of Congress, proclamations of the President, p. 387
letters of the Secretary of State, and other public documents connected with occurrences leading up to the breaking out of hostilities between this country and Spain are contained in this record, but are also set forth at sufficient length in the statement of facts contained in the report of the case of *The Pedro, ante*, and it is unnecessary, therefore, to repeat them.

After a hearing the District Court on the 27th of May, 1898, condemned the vessel, 87 Fed. Rep. 927, which was sold under the final decree of the court, and her proceeds deposited to abide the event of an appeal, which was then taken on the part of the claimant.

Mr. J. Parker Kirlin for appellant.

Mr. Assistant Attorney General Hoyt for the United States.

Mr. Joseph K. McCammon and *Mr. James H. Hayden*, for the naval captors, were on Mr. Hoyt's brief.

Mr. George A. King and *Mr. William B. King* filed a brief for certain captors.

MR. JUSTICE PECKHAM, after stating the facts as above, delivered the opinion of the court.

The Buena Ventura was a Spanish merchant vessel in the peaceful prosecution of her voyage to Norfolk, Virginia, from Ship Island, in the State of Mississippi, when, on the morning of April 22, 1898, she was captured as lawful prize of war, of the existence of which, up to the moment of capture, all her officers were ignorant. She was not violating any blockade, carried neither contraband of war nor any officer in the military or naval service of the enemy, nor any dispatch of or to the Spanish Government, and attempted no resistance when captured.

p. 388 The facts regarding this vessel place her within that class | which this Government has always desired to treat with great liberality. It is, as we think, historically accurate to say that this Government has always been, in its views, among the most advanced of the Governments of the world in favor of mitigating, as to all non-combatants, the hardships and horrors of war. To accomplish that object it has always advocated those rules which would in most cases do away with the right to capture the private property of an enemy on the high seas. 3 Wharton's International Law Digest, § 342. The refusal of this Government to agree to the Declaration of Paris was founded in part upon the refusal of the other Governments to agree to the proposition exempting private property, not contraband, from capture upon the sea.

It being plain that merchant vessels of the enemy carrying on innocent commercial enterprises at the time or just prior to the time when hostilities between the two countries broke out, would, in accordance with the later practice of civilized nations, be the subject of liberal treatment by the Executive, it is necessary when his proclamation has been issued, which lays down rules for treatment of merchant vessels, to put upon the words used therein the most liberal and extensive interpretation of which they are capable; and where there are two or more interpretations which possibly might be put upon the language, the one that will be most favorable to the belligerent party, in whose favor the proclamation is issued, ought to be adopted.

This is the doctrine of the English courts, as exemplified in *The Phœnix*, Spink's Prize Cases, 1, 5, and *The Argo*, Id. p. 52. It is the doctrine which this court believes to be proper and correct.

To ascertain the intention of the Executive we must look to the words which he uses. If the language is plain and clear, and the meaning

not open to discussion, there is an end of the matter. If, however, such is not the case, and interpretation or construction must be resorted to for the purpose of ascertaining the precise meaning of the text, it is our duty with reference to this public instrument to make it as broad in its exemptions as is reasonably possible. |

If inferences must be drawn therefrom in order to render certain p. 389
the limitations intended, those inferences should be, so far as is possible, in favor of the claimant in behalf of the owners of the vessel.

The language to justify an exemption of the vessel must, it is true, be found in the proclamation; yet if such language fail to state with entire clearness the full extent and scope of such exemption, thereby making it necessary that some interpretation thereof should be given, it is proper to refer to the prior views of the Executive Department of the Government as evidence of its policy regarding the subject. This is not for the purpose of enlarging the natural and ordinary meaning of the words used in the proclamation, but for the purpose of thereby throwing some light upon the intention of the Executive in issuing the instrument and also to aid in the interpretation of the language employed therein, where the extent or scope of that language is not otherwise entirely plain and clear. A reference to the views that have heretofore been announced by the Executive Department is made in 3 Wharton, *supra*, and it will be found that they are in entire accord with the most liberal spirit for the treatment of non-combatant vessels of the enemy.

We come now to the construction of the instrument. It will be seen that Congress on the 25th of April, 1898, declared war against Spain, and in the declaration it is stated that war had existed since the 21st of April preceding. The President on the 26th of April issued his proclamation regarding the principles to be followed in the prosecution of the war. It is dated the day it was issued. The fourth clause thereof may for convenience be here reproduced, as follows:

'4. Spanish merchant vessels in any ports or places within the United States shall be allowed until May 21st, 1898, inclusive, for loading their cargoes and departing from such ports or places; and such Spanish merchant vessels, if met at sea by any United States ship, shall be permitted to continue their voyage, if, upon examination of their papers, it shall appear that their cargoes were taken on board before the expiration of the above term: Provided, that nothing herein | contained shall p. 390
apply to Spanish vessels having on board any officer in the military or naval service of the enemy; or any coal (except such as may be necessary for their voyage), or any other article prohibited or contraband of war, or any dispatch of or to the Spanish Government.'

What is included by the words 'Spanish merchant vessels in any ports or places within the United States shall be allowed until May 21,

1898, inclusive, for loading their cargoes and departing from such ports or places'? At what time must these Spanish vessels be 'in any ports or places within the United States' in order to be exempt from capture? The time is not stated in the proclamation, and therefore the intention of the Executive as to the time must be inferred. It is a case for construction or interpretation of the language employed.

That language is open to several possible constructions. It might be said that in describing Spanish merchant vessels in any ports, etc., it was meant to include only those which were in such ports on the day when the proclamation was issued, April 26. Or it might be held (in accordance with the decision of the District Court) to include those that were in such ports on the 21st of April, the day that war commenced, as Congress declared. Or it might be construed so as to include not alone those vessels that were in port on that day, but also those that had sailed therefrom on any day up to and including the 21st of May, the last day of exemption, and were, when captured, continuing their voyage, without regard to the particular date of their departure from port, whether immediately before or subsequently to the commencement of the war or the issuing of the proclamation.

The District Judge, before whom several cases were tried together, held that the date of the commencement of the war (April 21) was the date intended by the Executive; that as the proclamation of the 22d of April gave thirty days to neutral vessels found in blockaded ports, it was but reasonable to consider that the same number of days, commencing at the outbreak of the war, should be allowed so as to bring it to
p. 391 the 21st of May, the day named; that although a retrospective | effect is not usually given to statutes, yet the question always is, what was the intention of the legislature?

He also said that 'the intention of the Executive was to fully recognize the recent practice of civilized nations, and not to sanction or permit the seizure of the vessels of the enemy within the harbors of the United States at the time of the commencement of the war, or to permit them to escape from ports to be seized immediately upon entering upon the high seas.' (See preamble to proclamation.)

In the Buena Ventura, the case at bar, the District Judge held that her case 'clearly does not come within the language of the proclamation.'

It is true the proclamation did not in so many words provide that vessels which had loaded in a port of the United States and sailed therefrom before the commencement of the war should be entitled to continue their voyage, but we think that those vessels are clearly within the intention of the proclamation under the liberal construction we are bound to give to that document.

An intention to include vessels of this class in the exemption from

capture seems to us a necessary consequence of the language used in the proclamation when interpreted according to the known views of this Government on the subject and which it is to be presumed were the views of the Executive. The vessel when captured had violated no law, she had sailed from Ship Island after having obtained written permission, in accordance with the laws of the United States, to proceed to Norfolk in Virginia, and the permission had been signed by the deputy collector of the port and the fees therefor paid by the ship. She had a cargo of lumber, loaded but a short time before the commencement of the war, and she left the port but forty-eight hours prior to that event. The language of the proclamation certainly does not preclude the exemption of this vessel, and it is not an unnatural or forced construction of the fourth clause to say that it includes this case.

The omission of any date in this clause, upon which the vessel must be in a port of the United States, and prior to | which the exemption would p. 392
not be allowed, is certainly very strong evidence that such a date was not material, so long as the loading and departure from our ports were accomplished before the expiration of May 21. It is also evident from the language used that the material concern was to fix a time in the future, prior to the expiration of which vessels of the character named might sail from our ports and be exempt from capture. The particular time at which the loading of cargoes and sailing from our ports should be accomplished was obviously unimportant, provided it was prior to the time specified. Whether it was before or after the commencement of the war, would be entirely immaterial. This seems to us to be the intention of the Executive, derived from reading the fourth clause with reference to the general rules of interpretation already spoken of, and we think there is no language in the proclamation which precludes the giving effect to such intention. Its purpose was to protect innocent merchantmen of the enemy who had been trading in our ports from capture, provided they sailed from such ports before a certain named time in the future, and that purpose would be wholly unaffected by the fact of a sailing prior to the war. That fact was immaterial to the scheme of the proclamation, gathered from all its language.

We do not assert that the clause would apply to a vessel which had left a port of the United States prior to the commencement of the war and had arrived at a foreign port and there discharged her cargo, and had then left for another foreign port prior to May 21. The instructions to United States ships, contained in the fourth clause, to permit the vessels 'to continue their voyage' would limit the operation of the clause to those vessels that were still on their original voyage from the United States, and had taken on board their cargo (if any they had) at a port of the United States before the expiration of the term mentioned.

The exemption would probably not apply to such a case as *The Phœnix*, (Spink's Prize Cases, 1). That case arose out of the English Order in Council, made at the commencement of the Crimean war. The vessel
p. 393 had sailed from an English port in the middle of | February, 1854, with a cargo, bound for Copenhagen, and having reached that port and discharged her cargo by the middle of March, she had sailed therefrom on the 10th of April, bound to a foreign port, and was captured on the 12th of April while proceeding on such voyage. The Order in Council was dated the 29th of March, 1854, and provided that ' Russian merchant vessels, in any ports or places within her Majesty's dominions, shall be allowed until the tenth day of May next, six weeks from the date hereof, for loading their cargoes and departing from such ports or places,' etc. The claim of exemption was made on the ground that the vessel had been in an English port, and although she sailed therefrom in the middle of February to Copenhagen and had there discharged her cargo, before the Order in Council was promulgated, yet it was still urged that she was entitled to exemption from capture. The court held the claim was not well founded, and that it could not by any latitude of construction hold a vessel to have been in an English port on the 29th of March, which on that day was lying in the port of Copenhagen, having at that time discharged the cargo which she had taken from the English port. It is true the court took the view that the vessel must at all events have been in an English port on the 29th of March in order to obtain exemption, and if not there on that day, the vessel did not come within the terms of the order and was not exempt from capture. From the language of the opinion in that case it would seem not only that a vessel departing the day before the 29th of March would not come within the exemption, but that a vessel arriving the day after the 29th, and departing before the 10th of May following, would also fail to do so; that the vessel must have been in an English port on the very day named, and if it departed the day before or arrived the day after, it was not covered by the order.

The French Government also, on the outbreak of the Crimean war, decreed a delay of six weeks, beginning on the date of the decree, to Russian merchant vessels in which to leave French ports. Russia issued the same kind of a decree, and other nations have at times made the
p. 394 same provisions. It is | claimed that they confine the exemption to vessels that are actually within the ports of the nation at the date of issuing the decree or order.

We are not inclined to put so narrow a construction upon the language used in this proclamation. The interpretation which we have given to it, while it may be more liberal than the other, is still one which may properly be indulged in.

If this vessel, instead of sailing on the 19th, had not sailed until the

21st of April, the court below says she would have been exempt from capture. In truth, she was from her character and her actual employment just as much the subject of liberal treatment, and was as equitably entitled to an exemption when sailing on the 19th, as she would have been had she waited until the 21st. No fact had occurred since her sailing which altered her case in principle from the case of a vessel which had been in port on, though sailing after, the 21st. To attribute an intention on the part of the Executive to exempt a vessel if she sailed on or after the 21st of April, and before the 21st of May, and to refuse such exemption to a vessel in precisely the same situation, only sailing before the 21st, would, as we think, be without reasonable justification. It may safely be affirmed that he never had any such distinction in mind and never intended it to exist. There is nothing in the nature of the two cases calling for a difference in their treatment. They both alike called for precisely the same rule, and if there be language in the clause or proclamation from which an inference can be drawn favorable to the exemption, and none which precludes it, we are bound to hold that the exemption is given. We think the language of the proclamation does permit the inference and that there is none which precludes it.

We are aware of no adjudications of our own court as to the meaning to be given to words similar to those contained in the proclamation, and it may be that a step in advance is now taken upon this subject. Where, however, the words are reasonably capable of an interpretation which shall include a vessel of this description in the exemption from capture, we are not averse to adopting it, even though this court may be the first to do so. If the Executive should hereafter be inclined | to take the p. 395
other view, the language of his proclamation could be so altered as to leave no doubt of that intention, and it would be the duty of this court to be guided and controlled by it.

Deciding as we do in regard to the fourth clause, it becomes unnecessary to examine the other grounds for a reversal discussed at the bar.

The question of costs then arises. We had occasion in *The Olinde Rodrigues*, 174 U. S. 510, to examine that question in relation to the existence of probable cause for making the capture. In that case it was held that such probable cause did exist, and although the facts therein proved did not commend the vessel to the favorable consideration of the court, yet upon a careful review of the entire evidence we held that we were not compelled to proceed to the extremity of condemning the vessel. Restitution was, therefore, awarded, but without damages. Payment of the costs and expenses incident to her custody and preservation, and of all costs in the case except the fees of counsel, were imposed upon the ship.

In this case, but for the proclamation of April 26, the ship would have been liable to seizure and condemnation as enemy's property.

At the time of seizure, however, (April 22,) that proclamation had not been issued, and hence there was probable cause for her seizure, although the vessel was herself entirely without fault. The subsequent issuing of the proclamation covering the case of a vessel situated as was this one took away the right to condemn which otherwise would have existed. Thus, at the time of seizure, both parties, the capturing and the captured ship, were without fault, and while we reverse the judgment of condemnation and award restitution, we think it should be without damages or costs in favor of the vessel captured.

The ship having been sold, the moneys arising from the sale must be paid to the claimant without the deduction of any costs arising in the proceeding, but after deducting the expenses properly incident to her custody and preservation up to the time of her sale, and it is so ordered.

THE CHIEF JUSTICE and MR. JUSTICE GRAY and MR. JUSTICE MCKENNA dissented.

The Paquete Habana. The Lola.

(175 U.S. Reports, 677) 1900.

APPEALS FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE SOUTHERN DISTRICT OF FLORIDA.

Nos. 395, 396. Argued November 7, 8, 1899.—Decided January 8, 1900.

Under the act of Congress of March 3, 1891, c. 517, this court has jurisdiction of appeals from all final sentences and decrees in prize causes, without regard to the amount in dispute, and without any certificate of the District Judge as to the importance of the particular case.

International law is part of our law, and must be ascertained and administered by the courts of justice of appropriate jurisdiction, as often as questions of right depending upon it are duly presented for their determination. For this purpose, where there is no treaty, and no controlling executive or legislative act or judicial decision, resort must be had to the customs and usages of civilized nations; and, as evidence of these, to the works of jurists and commentators, not for the speculations of their authors concerning what the law ought to be, but for trustworthy evidence of what the law really is.

At the present day, by the general consent of the civilized nations of the world, and independently of any express treaty or other public act, it is an established rule of international law that coast fishing vessels, with their implements and supplies, cargoes and crews, unarmed, and honestly pursuing their peaceful calling of catching and bringing in fresh fish, are exempt from capture as prize of war. And this rule is one which prize courts, administering the law of nations, are bound to take judicial notice of, and to give effect to, in the absence of any treaty or other public act of their own government in relation to the matter.

At the breaking out of the recent war with Spain, two fishing smacks—the one a sloop, 43 feet long on the keel and of 25 tons burden, and with a crew of three men, and the other a schooner, 51 feet long on the keel and of 35 tons burden, and with a crew of six men—were regularly engaged in fishing on the coast of Cuba, sailing under the Spanish flag, and each owned by a Spanish subject, residing in Havana; her crew, who also resided there, had no interest

in the vessel, but were entitled to shares, amounting in all to two thirds, of her catch, the other third belonging to her owner; and her cargo consisted of fresh fish, caught by her crew from the sea, put on board as they were caught, and kept and sold alive. Each vessel left Havana on a coast fishing voyage, and sailed along the coast of Cuba about two hundred miles to the west end of the island; the sloop there fished for twenty-five days in the territorial waters of Spain; and the schooner extended her fishing trip a hundred | miles farther p. 678
across the Yucatan Channel, and fished for eight days on the coast of Yucatan. On her return, with her cargo of live fish, along the coast of Cuba, and when near Havana, each was captured by one of the United States blockading squadron. Neither fishing vessel had any arms or ammunition on board; had any knowledge of the blockade, or even of the war, until she was stopped by a blockading vessel; made any attempt to run the blockade, or any resistance at the time of her capture; nor was there any evidence that she, or her crew, was likely to aid the enemy. *Held*, that both captures were unlawful, and without probable cause.

'THE cases are stated in the opinion of the court.

Mr. J. Parker Kirlin for appellants.

Mr. Assistant Attorney General Hoyt for the United States.

Mr. Joseph K. McCammon and *Mr. James H. Hayden* filed a brief for the captors. *Mr. George A. King* and *Mr. William B. King* filed a brief 'for certain captors.'

MR. JUSTICE GRAY delivered the opinion of the court.

These are two appeals from decrees of the District Court of the United States for the Southern District of Florida, condemning two fishing vessels and their cargoes as prize of war.

Each vessel was a fishing smack, running in and out of Havana, and regularly engaged in fishing on the coast of Cuba; sailed under the Spanish flag; was owned by a Spanish subject of Cuban birth, living in the city of Havana; was commanded by a subject of Spain, also residing in Havana; and her master and crew had no interest in the vessel, but were entitled to shares, amounting in all to two thirds, of her catch, the other third belonging to her owner. Her cargo consisted of fresh fish, caught by her crew from the sea, put on board as they were caught, and kept and sold alive. Until stopped by the blockading squadron, she had no knowledge of the existence of the war, or of any blockade. She had no arms or ammunition on board, and made no attempt to run the blockade after she knew of its existence, nor any resistance at the time of the capture.

The Paquete Habana was a sloop, 43 feet long on the keel, | and of p. 679
25 tons burden, and had a crew of three Cubans, including the master, who had a fishing license from the Spanish Government, and no other commission or license. She left Havana March 25, 1898; sailed along the coast of Cuba to Cape San Antonio at the western end of the island, and there fished for twenty-five days, lying between the reefs off the cape, within the territorial waters of Spain; and then started back for

Havana, with a cargo of about 40 quintals of live fish. On April 25, 1898, about two miles off Mariel, and eleven miles from Havana, she was captured by the United States gunboat Castine.

The Lola was a schooner, 51 feet long on the keel, and of 35 tons burden, and had a crew of six Cubans, including the master, and no commission or license. She left Havana April 11, 1898, and proceeded to Campeachy Sound off Yucatan, fished there eight days, and started back for Havana with a cargo of about 10,000 pounds of live fish. On April 26, 1898, near Havana, she was stopped by the United States steamship Cincinnati, and was warned not to go into Havana, but was told that she would be allowed to land at Bahia Honda. She then changed her course, and put for Bahia Honda, but on the next morning, when near that port, was captured by the United States steamship Dolphin.

Both the fishing vessels were brought by their captors into Key West. A libel for the condemnation of each vessel and her cargo as prize of war was there filed on April 27, 1898; a claim was interposed by her master, on behalf of himself and the other members of the crew, and of her owner; evidence was taken, showing the facts above stated; and on May 30, 1898, a final decree of condemnation and sale was entered, 'the court not being satisfied that as a matter of law, without any ordinance, treaty or proclamation, fishing vessels of this class are exempt from seizure.'

Each vessel was thereupon sold by auction; the Paquete Habana for the sum of $490; and the Lola for the sum of $800. There was no other evidence in the record of the value of either vessel or of her cargo.

p. 680 It has been suggested, in behalf of the United States, that | this court has no jurisdiction to hear and determine these appeals, because the matter in dispute in either case does not exceed the sum or value of $2000, and the District Judge has not certified that the adjudication involves a question of general importance.

The suggestion is founded on section 695 of the Revised Statutes, which provides that 'an appeal shall be allowed to the Supreme Court from all final decrees of any District Court in prize causes where the matter in dispute, exclusive of costs, exceeds the sum or value of two thousand dollars; and shall be allowed, without reference to the matter in dispute, on the certificate of the District Judge that the adjudication involves a question of general importance.'

The Judiciary Acts of the United States, for a century after the organization of the Government under the Constitution, did impose pecuniary limits upon appellate jurisdiction.

In actions at law and suits in equity, the pecuniary limit of the appellate jurisdiction of this court from the Circuit Courts of the United

States was for a long time fixed at $2000. Acts of September 24, 1789, c. 20, § 22; 1 Stat. 84; March 3, 1803, c. 40; 2 Stat. 244; *Gordon* v. *Ogden*, 3 Pet. 33; Rev. Stat. §§ 691, 692. In 1875 it was raised to $5000. Act of February 16, 1875, c. 77, § 3; 18 Stat. 316. And in 1889 this was modified by providing that, where the judgment or decree did not exceed the sum of $5000, this court should have appellate jurisdiction upon the question of the jurisdiction of the Circuit Court, and upon that question only. Act of February 25, 1889, c. 236, § 1; 25 Stat. 693; *Parker* v. *Ormsby*, 141 U. S. 81.

As to cases of admiralty and maritime jurisdiction, including prize causes, the Judiciary Act of 1789, in § 9, vested the original jurisdiction in the District Courts, without regard to the sum or value in controversy; and in § 21, permitted an appeal from them to the Circuit Court where the matter in dispute exceeded the sum or value of $300. 1 Stat. 77, 83; *The Betsey*, 3 Dall. 6, 16; *The Amiable Nancy*, 3 Wheat. 546; *Stratton* v. *Jarvis*, 8 Pet. 4, 11. By the act of March 3, 1803, c. 40, appeals to the Circuit Court were permitted from all final decrees of a District Court where | the matter in dispute exceeded the sum or value of $50; and p. 681
from the Circuit Courts to this court in all cases 'of admiralty and maritime jurisdiction, and of prize or no prize,' in which the matter in dispute exceeded the sum or value of $2000. 2 Stat. 244; *Jenks* v. *Lewis*, 3 Mason, 503; *Stratton* v. *Jarvis*, above cited; *The Admiral*, 3 Wall. 603, 612. The acts of March 3, 1863, c. 86, § 7, and June 30, 1864, c. 174, § 13, provided that appeals from the District Courts in prize causes should lie directly to this court, where the amount in controversy exceeded $2000, 'or on the certificate of the District Judge that the adjudication involves a question of general importance.' 12 Stat. 760; 13 Stat. 310. The provision of the act of 1803, omitting the words, 'and of prize or no prize,' was reënacted in section 692 of the Revised Statutes; and the provision of the act of 1864, concerning prize causes, was substantially reënacted in section 695 of the Revised Statutes, already quoted.

But all this has been changed by the act of March 3, 1891, c. 517, establishing the Circuit Courts of Appeals, and creating a new and complete scheme of appellate jurisdiction, depending upon the nature of the different cases, rather than upon the pecuniary amount involved. 26 Stat. 826.

By that act, as this court has declared, the entire appellate jurisdiction from the Circuit and District Courts of the United States was distributed, 'according to the scheme of the act,' between this court and the Circuit Courts of Appeals thereby established, 'by designating the classes of cases' of which each of these courts was to have final jurisdiction. *McLish* v. *Roff*, 141 U. S. 661, 666; *American Construction*

Co. v. *Jacksonville Railway*, 148 U. S. 372, 382; *Carey* v. *Houston & Texas Railway*, 150 U. S. 170, 179.

The intention of Congress, by the act of 1891, to make the nature of the case, and not the amount in dispute, the test of the appellate jurisdiction of this court from the District and Circuit Courts clearly appears upon examination of the leading provisions of the act.

Section 4 provides that no appeal, whether by writ of error or other-
p. 682 wise, shall hereafter be taken from a District Court | to a Circuit Court; but that all appeals, by writ of error or otherwise, from the District Courts, 'shall only be subject to review' in this court, or in the Circuit Court of Appeals, 'as is hereinafter provided,' and 'the review, by appeal, by writ of error, or otherwise,' from the Circuit Courts, 'shall be had only' in this court, or in the Circuit Court of Appeals, 'according to the provisions of this act regulating the same.'

Section 5 provides that 'appeals or writs of error may be taken from the District Courts, or from the existing Circuit Courts, direct to the Supreme Court, in the following cases:'

First. 'In any case in which the jurisdiction of the court is in issue; in such cases the question of jurisdiction alone shall be certified to the Supreme Court from the court below for decision.' This clause includes 'any case,' without regard to amount, in which the jurisdiction of the court below is in issue; and differs in this respect from the act of 1889, above cited.

Second. 'From the final sentences and decrees in prize causes.' This clause includes the whole class of 'the final sentences and decrees in prize causes,' and omits all provisions of former acts regarding amount in controversy, or certificate of a District Judge.

Third. 'In cases of conviction of a capital or otherwise infamous crime.' This clause looks to the nature of the crime, and not to the extent of the punishment actually imposed. A crime which might have been punished by imprisonment in a penitentiary is an infamous crime, even if the sentence actually pronounced is of a small fine only. *Ex parte Wilson*, 114 U. S. 417, 426. Consequently, such a sentence for such a crime was subject to the appellate jurisdiction of this court, under this clause, until this jurisdiction, so far as regards crimes not capital, was transferred to the Circuit Court of Appeals by the act of January 20, 1897, c. 68. 29 Stat. 492.

Fourth. 'In any case that involves the construction or application of the Constitution of the United States.'

Fifth. 'In any case in which the constitutionality of any law of the United States, or the validity or construction of any treaty made under its authority, is drawn in question.' |

p. 683 Sixth. 'In any case in which the constitution or law of a State is

claimed to be in contravention of the Constitution of the United States.'

Each of these last three clauses, again, includes 'any case' of the class mentioned. They all relate to what are commonly called Federal questions, and cannot reasonably be construed to have intended that the appellate jurisdiction of this court over such questions should be restricted by any pecuniary limit—especially in their connection with the succeeding sentence of the same section: 'Nothing in this act shall affect the jurisdiction of the Supreme Court in cases appealed from the highest court of a State, nor the construction of the statute providing for review of such cases.' Writs of error from this court to review the judgments of the highest court of a State upon such questions have never been subject to any pecuniary limit. Act of September 24, 1789, c. 20, § 25; 1 Stat. 85; *Buel* v. *Van Ness*, 8 Wheat. 312; act of February 5, 1867, c. 28, § 2; 14 Stat. 386; Rev. Stat. § 709.

By section 6 of the act of 1891, this court is relieved of much of the appellate jurisdiction that it had before; the appellate jurisdiction from the District and Circuit Courts 'in all cases other than those provided for in the preceding section of this act, unless otherwise provided by law,' is vested in the Circuit Court of Appeals; and its decisions in admiralty cases, as well as in cases arising under the criminal laws, and in certain other classes of cases, are made final, except that that court may certify to this court questions of law, and that this court may order up the whole case by writ of certiorari. It is settled that the words 'unless otherwise provided by law,' in this section, refer only to provisions of the same act, or of contemporaneous or subsequent acts, and do not include provisions of earlier statutes. *Lau Ow Bew* v. *United States*, 144 U. S. 47, 57; *Hubbard* v. *Soby*, 146 U. S. 56; *American Construction Co.* v. *Jacksonville Railway*, 148 U. S. 372, 383.

The act of 1891 nowhere imposes a pecuniary limit upon the appellate jurisdiction, either of this court or of the Circuit Court of Appeals, from a District or Circuit Court of the United States. The only pecuniary limit imposed is one of | $1000 upon the appeal to this court of a case p. 684
which has been once decided on appeal in the Circuit Court of Appeals, and in which the judgment of that court is not made final by section 6 of the act.

Section 14 of the act of 1891, after specifically repealing section 691 of the Revised Statutes and section 3 of the act of February 16, 1875, further provides that 'all acts and parts of acts relating to appeals or writs of error, inconsistent with the provisions for review by appeals or writs of error in the preceding sections five and six of this act, are hereby repealed.' 26 Stat. 829, 830. The object of the specific repeal, as this court has declared, was to get rid of the pecuniary limit in the acts referred to. *McLish* v. *Roff*, 141 U. S. 661, 667. And, although neither

section 692 nor section 695 of the Revised Statutes is repealed by name, yet, taking into consideration the general repealing clause, together with the affirmative provisions of the act, the case comes within the reason of the decision in an analogous case, in which this court said: 'The provisions relating to the subject-matter under consideration are, however, so comprehensive, as well as so variant from those of former acts, that we think the intention to substitute the one for the other is necessarily to be inferred and must prevail.' *Fisk* v. *Henarie*, 142 U. S. 459, 468.

The decision of this court in the recent case of *United States* v. *Rider*, 163 U. S. 132, affords an important, if not controlling precedent. From the beginning of this century until the passage of the act of 1891, both in civil and in criminal cases, questions of law, upon which two judges of the Circuit Court were divided in opinion, might be certified by them to this court for decision. Acts of: April 29, 1802, c. 31, § 6; 2 Stat. 159; June 1, 1872, c. 255, § 1; 17 Stat. 196; Rev. Stat. §§ 650–652, 693, 697; *Insurance Co.* v. *Dunham*, 11 Wall. 1, 21; *United States* v. *Sanges*, 144 U. S. 310, 320. But in *United States* v. *Rider*, it was adjudged by this court that the act of 1891 had superseded and repealed the earlier acts authorizing questions of law to be certified from the Circuit Court to this court; and the grounds of that adjudication
p. 685 sufficiently appear by | the statement of the effect of the act of 1891 in two passages of the opinion: 'Appellate jurisdiction was given in all criminal cases by writ of error, either from this court or from the Circuit Courts of Appeals, and in all civil cases by appeal or error, without regard to the amount in controversy, except as to appeals or writs of error to or from the Circuit Courts of Appeals in cases not made final, as specified in § 6.' 'It is true that repeals by implication are not favored, but we cannot escape the conclusion that, tested by its scope, its obvious purpose and its terms, the act of March 3, 1891, covers the whole subject-matter under consideration, and furnishes the exclusive rule in respect of appellate jurisdiction on appeal, writ of error or certificate.' 163 U. S. 138–140.

That judgment was thus rested upon two successive propositions: First, that the act of 1891 gives appellate jurisdiction, either to this court or to the Circuit Court of Appeals, in all criminal cases, and in all civil cases 'without regard to the amount in controversy.' Second, that the act, by its terms, its scope and its obvious purpose, 'furnishes the exclusive rule in respect of appellate jurisdiction on appeal, writ of error or certificate.'

As was long ago said by Chief Justice Marshall, 'the spirit as well as the letter of a statute must be respected, and where the whole context of the law demonstrates a particular intent in the legislature to effect a certain object, some degree of implication may be called in to aid that

intent.' *Durousseau* v. *United States*, 6 Cranch, 307, 314. And it is a well settled rule in the construction of statutes, often affirmed and applied by this court, that, ' even where two acts are not in express terms repugnant, yet if the latter act covers the whole subject of the first, and embraces new provisions, plainly showing that it was intended as a substitute for the first act, it will operate as a repeal of that act.' *United States* v. *Tynen*, 11 Wall. 88, 92 ; *King* v. *Cornell*, 106 U. S. 395, 396 ; *Tracy* v. *Tuffly*, 134 U. S. 206, 223 ; *Fisk* v. *Henarie*, 142 U. S. 459, 468 ; *District of Columbia* v. *Hutton*, 143 U. S. 18, 27 ; *United States* v. *Healey*, 160 U. S. 136, 147.

We are of opinion that the act of 1891, upon its face, read | in the p. 686
light of settled rules of statutory construction, and of the decisions of this court, clearly manifests the intention of Congress to cover the whole subject of the appellate jurisdiction from the District and Circuit Courts of the United States, so far as regards in what cases, as well as to what courts, appeals may be taken, and to supersede and repeal, to this extent, all the provisions of earlier acts of Congress, including those that imposed pecuniary limits upon such jurisdiction ; and, as part of the new scheme, to confer upon this court jurisdiction of appeals from all final sentences and decrees in prize causes, without regard to the amount in dispute, and without any certificate of the District Judge as to the importance of the particular case.

We are then brought to the consideration of the question whether, upon the facts appearing in these records, the fishing smacks were subject to capture by the armed vessels of the United States during the recent war with Spain.

By an ancient usage among civilized nations, beginning centuries ago, and gradually ripening into a rule of international law, coast fishing vessels, pursuing their vocation of catching and bringing in fresh fish, have been recognized as exempt, with their cargoes and crews, from capture as prize of war.

This doctrine, however, has been earnestly contested at the bar ; and no complete collection of the instances illustrating it is to be found, so far as we are aware, in a single published work, although many are referred to and discussed by the writers on international law, notably in 2 Ortolan, Règles Internationales et Diplomatic de la Mer, (4th ed.) lib. 3, c. 2, pp. 51–56 ; in 4 Calvo, Droit International, (5th ed.) §§ 2367–2373 ; in De Boeck, Propriété Privée Ennemie sous Pavillon Ennemi, §§ 191–196 ; and in Hall, International Law, (4th. ed.) § 148. It is therefore worth the while to trace the history of the rule, from the earliest accessible sources, through the increasing recognition of it, with occasional setbacks, to what we may now justly consider as its final establishment in our own country and generally throughout the civilized world.

p. 687 The earliest acts of any government on the subject, mentioned | in the books, either emanated from, or were approved by, a King of England.

In 1403 and 1406, Henry IV issued orders to his admirals and other officers, entitled 'Concerning Safety for Fishermen—*De Securitate pro Piscatoribus.*' By an order of October 26, 1403, reciting that it was made pursuant to a treaty between himself and the King of France; and for the greater safety of the fishermen of either country, and so that they could be, and carry on their industry, the more safely on the sea, and deal with each other in peace; and that the French King had consented that English fishermen should be treated likewise; it was ordained that French fishermen might, during the then pending season for the herring fishery, safely fish for herrings and all other fish, from the harbor of Gravelines and the island of Thanet to the mouth of the Seine and the harbor of Hautoune. And by an order of October 5, 1406, he took into his safe conduct, and under his special protection, guardianship and defence, all and singular the fishermen of France, Flanders and Brittany, with their fishing vessels and boats, everywhere on the sea, through and within his dominions, jurisdictions and territories, in regard to their fishery, while sailing, coming and going, and, at their pleasure, freely and lawfully fishing, delaying or proceeding, and returning homeward with their catch of fish, without any molestation or hindrance whatever; and also their fish, nets, and other property and goods soever; and it was therefore ordered that such fishermen should not be interfered with, provided they should comport themselves well and properly, and should not, by color of these presents, do or attempt, or presume to do or attempt, anything that could prejudice the King, or his kingdom of England, or his subjects. 8 Rymer's Foedera, 336, 451.

The treaty made October 2, 1521, between the Emperor Charles V and Francis I of France, through their ambassadors, recited that a great and fierce war had arisen between them, because of which there had been, both by land and by sea, frequent depredations and incursions on either
p. 688 side, to the grave detriment and intolerable injury of the innocent | subjects of each; and that a suitable time for the herring fishery was at hand, and, by reason of the sea being beset by the enemy, the fishermen did not dare to go out, whereby the subject of their industry, bestowed by heaven to allay the hunger of the poor, would wholly fail for the year, unless it were otherwise provided—*quo fit, ut piscaturæ commoditas, ad pauperum levandam famem a cœlesti numine concessa, cessare hoc anno omnino debeat, nisi aliter provideatur.* And it was therefore agreed that the subjects of each sovereign, fishing in the sea, or exercising the calling of fishermen, could and might, until the end of the next January, without incurring any attack, depredation, molestation, trouble or hindrance soever, safely and freely, everywhere in the sea, take herrings and every

other kind of fish, the existing war by land and sea notwithstanding ' and further that, during the time aforesaid, no subject of either sovereign should commit, or attempt or presume to commit, any depredation, force, violence, molestation or vexation, to or upon such fishermen, or their vessels, supplies, equipments, nets and fish, or other goods soever truly appertaining to fishing. The treaty was made at Calais, then an English possession. It recites that the ambassadors of the two sovereigns met there at the earnest request of Henry VIII, and with his countenance, and in the presence of Cardinal Wolsey, his chancellor and representative. And towards the end of the treaty it is agreed that the said King and his said representative, ' by whose means the treaty stands concluded. shall be conservators of the agreements therein, as if thereto by both parties elected and chosen.' 4 Dumont, Corps Diplomatique, pt. 1, pp. 352, 353.

The herring fishery was permitted, in time of war, by French and Dutch edicts in 1536. Bynkershoek, Quæstiones Juris Publicæ, lib. 1, c. 3 ; 1 Emerigon des Assurances, c. 4, sect. 9 ; c. 12, sect. 19, § 8.

France, from remote times, set the example of alleviating the evils of war in favor of all coast fishermen. In the compilation entitled Us et Coutumes de la Mer, published by Cleirac in 1661, and in the third part thereof, containing ' Maritime or Admiralty Jurisdiction—*la Jurisdiction de la Marine | ou d'Admirauté*—as well in time of peace as in time of war,' p. 689 article 80 is as follows : ' The admiral may in time of war accord fishing truces—*tresves pescheresses*—to the enemy and to his subjects ; provided that the enemy will likewise accord them to Frenchmen.' Cleirac, 544. Under this article, reference is made to articles 49 and 79 respectively of the French ordinances concerning the Admiralty in 1543 and 1584, of which it is but a reproduction. 4 Pardessus, Collection de Lois Maritimes, 319 ; 2 Ortolan, 51. And Cleirac adds, in a note, this quotation from Froissart's Chronicles : ' Fishermen on the sea, whatever war there were in France and England, never did harm to one another ; so they are friends, and help one another at need—*Pescheurs sur mer, quelque guerre qui soit en France et Angleterre, jamais ne se firent mal l'un a l'autre ; ainçois sont amis, et s'aydent l'un à l'autre au besoin.*'

The same custom would seem to have prevailed in France until towards the end of the seventeenth century. For example, in 1675, Louis XIV and the States General of Holland, by mutual agreement, granted to Dutch and French fishermen the liberty, undisturbed by their vessels of war, of fishing along the coasts of France, Holland and England. D'Hauterive et De Cussy, Traités de Commerce, pt. 1, vol. 2, p. 278. But by the ordinances of 1681 and 1692 the practice was discontinued, because, Valin says, of the faithless conduct of the enemies of France, who, abusing the good faith with which she had always observed the treaties, habitually

carried off her fishermen, while their own fished in safety. 2 Valin sur l'Ordonnance de la Marine, (1776) 689, 690; 2 Ortolan, 52; De Boeck, § 192.

The doctrine which exempts coast fishermen with their vessels and cargoes from capture as prize of war has been familiar to the United States from the time of the War of Independence.

On June 5, 1779, Louis XVI, our ally in that war, addressed a letter to his admiral, informing him that the wish he had always had of alleviating, as far as he could, the hardships of war, had directed his attention to
p. 690 that class of his subjects | which devoted itself to the trade of fishing, and had no other means of livelihood; that he had thought that the example which he should give to his enemies, and which could have no other source than the sentiments of humanity which inspired him, would determine them to allow to fishermen the same facilities which he should consent to grant; and that he had therefore given orders to the commanders of all his ships not to disturb English fishermen, nor to arrest their vessels laden with fresh fish, even if not caught by those vessels; provided they had no offensive arms, and were not proved to have made any signals creating a suspicion of intelligence with the enemy; and the admiral was directed to communicate the King's intentions to all officers under his control. By a royal order in council of November 6, 1780, the former orders were confirmed; and the capture and ransom, by a French cruiser, of *The John and Sarah*, an English vessel, coming from Holland, laden with fresh fish, were pronounced to be illegal. 2 Code des Prises, (ed. 1784) 721, 901, 903.

Among the standing orders made by Sir James Marriott, Judge of the English High Court of Admiralty, was one of April 11, 1780, by which it was 'ordered, that all causes of prize of fishing boats or vessels taken from the enemy may be consolidated in one monition, and one sentence or interlocutory, if under fifty tons burden, and not more than six in number.' Marriott's Formulary, 4. But by the statements of his successor, and of both French and English writers, it appears that England, as well as France, during the American Revolutionary War, abstained from interfering with the coast fisheries. *The Young Jacob and Johanna*, 1 C. Rob. 20; 2 Ortolan, 53; Hall, § 148.

In the treaty of 1785 between the United States and Prussia, article 23, (which was proposed by the American Commissioners, John Adams, Benjamin Franklin and Thomas Jefferson, and is said to have been drawn up by Franklin,) provided that, if war should arise between the contracting parties, 'all women and children, scholars of every faculty,
p. 691 cultivators of the earth, artisans, manufacturers and fishermen, | unarmed and inhabiting unfortified towns, villages or places, and in general all others whose occupations are for the common subsistence and benefit of mankind,

shall be allowed to continue their respective employments, and shall not be molested in their persons ; nor shall their houses or goods be burnt or otherwise destroyed, nor their fields wasted, by the armed force of the enemy, into whose power, by the events of war, they may happen to fall ; but if anything is necessary to be taken from them for the use of such armed force, the same shall be paid for at a reasonable price.' 8 Stat. 96 ; 1 Kent Com. 91 note ; Wheaton's History of the Law of Nations, 306, 308. Here was the clearest exemption from hostile molestation or seizure of the persons, occupations, houses and goods of unarmed fishermen inhabiting unfortified places. The article was repeated in the later treaties between the United States and Prussia of 1799 and 1828. 8 Stat. 174, 384. And Dana, in a note to his edition of Wheaton's International Law, says: ' In many treaties and decrees, fishermen catching fish as an article of food are added to the class of persons whose occupation is not to be disturbed in war.' Wheaton's International Law, (8th ed.) § 345, note 168.

Since the United States became a nation, the only serious interruptions, so far as we are informed, of the general recognition of the exemption of coast fishing vessels from hostile capture, arose out of the mutual suspicions and recriminations of England and France during the wars of the French Revolution.

In the first years of those wars, England having authorized the capture of French fishermen, a decree of the French National Convention of October 2, 1793, directed the executive power ' to protest against this conduct, theretofore without example ; to reclaim the fishing boats seized ; and, in case of refusal, to resort to reprisals.' But in July, 1796, the Committee of Public Safety ordered the release of English fishermen seized under the former decree, ' not considering them as prisoners of war.' *La Nostra Segnora de la Piedad*, (1801) cited below ; 2 De Cussy, Droit Maritime, 164, 165 ; 1 Massé, Droit Commercial, (2d ed.) 266, 267. |

On January 24, 1798, the English Government, by express order, p. 692
instructed the commanders of its ships to seize French and Dutch fishermen with their boats. 6 Martens, Recueil des Traités, (2d ed.) 505 ; 6 Schoell, Histoire des Traités, 119 ; 2 Ortolan, 53. After the promulgation of that order, Lord Stowell (then Sir William Scott) in the High Court of Admiralty of England condemned small Dutch fishing vessels as prize of war. In one case, the capture was in April, 1798, and the decree was made November 13, 1798. *The Young Jacob and Johanna*, 1 C. Rob. 20. In another case, the decree was made August 23, 1799. *The Noydt Gedacht*, 2 C. Rob. 137, note.

For the year 1800, the orders of the English and French governments and the correspondence between them may be found in books already referred to. 6 Martens, 503–512 ; 6 Schoell, 118–120 ; 2 Ortolan, 53, 54.

The doings for that year may be summed up as follows: On March 27, 1800, the French government, unwilling to resort to reprisals, reënacted the orders given by Louis XVI in 1780, above mentioned, prohibiting any seizure by the French ships of English fishermen, unless armed, or proved to have made signals to the enemy. On May 30, 1800, the English government, having received notice of that action of the French government, revoked its order of January 24, 1798. But, soon afterwards, the English government complained that French fishing boats had been made into fireboats at Flushing, as well as that the French government had impressed, and had sent to Brest, to serve in its flotilla, French fishermen and their boats, even those whom the English had released on condition of their not serving; and on January 21, 1801, summarily revoked its last order, and again put in force its order of January 24, 1798. On February 16, 1801, Napoleon Bonaparte, then First Consul, directed the French commissioner at London to return at once to France, first declaring to the English government that its conduct, 'contrary to all the usages of civilized nations, and to the common law which governs them, even in time of war, gave to the existing war a character of rage and bitterness which destroyed even the relations usual in a loyal war,'
p. 693 and | 'tended only to exasperate the two nations, and to put off the term of peace;' and that the French government, having always made it 'a maxim to alleviate as much as possible the evils of war, could not think, on its part, of rendering wretched fishermen victims of a prolongation of hostilities, and would abstain from all reprisals.'

On March 16, 1801, the Addington Ministry, having come into power in England, revoked the orders of its predecessors against the French fishermen; maintaining, however, that 'the freedom of fishing was nowise founded upon an agreement, but upon a simple concession;' that 'this concession would be always subordinate to the convenience of the moment,' and that 'it was never extended to the great fishery, or to commerce in oysters or in fish.' And the freedom of the coast fisheries was again allowed on both sides. 6 Martens, 514; 6 Schoell, 121; 2 Ortolan, 54; Manning, Law of Nations, (Amos ed.) 206.

Lord Stowell's judgment in *The Young Jacob and Johanna*, 1 C. Rob. 20, above cited, was much relied on by the counsel for the United States, and deserves careful consideration.

The vessel there condemned is described in the report as 'a small Dutch fishing vessel taken April, 1798, on her return from the Dogger bank to Holland;' and Lord Stowell, in delivering judgment, said: 'In former wars, it has not been usual to make captures of these small fishing vessels; but this rule was a rule of comity only, and not of legal decision; it has prevailed from views of mutual accommodation between neighboring countries, and from tenderness to a poor and industrious

order of people. In the present war there has, I presume, been sufficient reason for changing this mode of treatment, and, as they are brought before me for my judgment, they must be referred to the general principles of this court ; they fall under the character and description of the last class of cases ; that is, of ships constantly and exclusively employed in the enemy's trade.' And he added : ' It is a farther satisfaction to me in giving this judgment to observe that the facts also bear strong marks of a false and fraudulent transaction.' |

Both the capture and condemnation were within a year after the p. 694
order of the English government of January 24, 1798, instructing the commanders of its ships to seize French and Dutch fishing vessels, and before any revocation of that order. Lord Stowell's judgment shows that his decision was based upon the order of 1798, as well as upon strong evidence of fraud. Nothing more was adjudged in the case.

But some expressions in his opinion have been given so much weight by English writers, that it may be well to examine them particularly. The opinion begins by admitting the known custom in former wars not to capture such vessels—adding, however, ' but this was a rule of comity only, and not of legal decision.' Assuming the phrase ' legal decision ' to have been there used, in the sense in which courts are accustomed to use it, as equivalent to ' judicial decision,' it is true that, so far as appears, there had been no such decision on the point in England. The word ' comity ' was apparently used by Lord Stowell as synonymous with courtesy or good will. But the period of a hundred years which has since elapsed is amply sufficient to have enabled what originally may have rested in custom or comity, courtesy or concession, to grow, by the general assent of civilized nations, into a settled rule of international law. As well said by Sir James Mackintosh : ' In the present century a slow and silent, but very substantial mitigation has taken place in the practice of war ; and in proportion as that mitigated practice has received the sanction of time, it is raised from the rank of mere usage, and becomes part of the law of nations.' Discourse on the Law of Nations, 38 ; 1 Miscellaneous Works, 360.

The French prize tribunals, both before and after Lord Stowell's decision, took a wholly different view of the general question. In 1780, as already mentioned, an order in council of Louis XVI had declared illegal the capture by a French cruiser of *The John and Sarah*, an English vessel, coming from Holland, laden with fresh fish. And on May 17, 1801, where a Portuguese fishing vessel, with her cargo of fish, having no more crew than was needed for her management, and for serving the nets, on a trip of several days, had been captured | in April, 1801, by a French p. 695
cruiser, three leagues off the coast of Portugal, the Council of Prizes held that the capture was contrary to ' the principles of humanity, and the

maxims of international law,' and decreed that the vessel, with the fish on board, or the net proceeds of any that had been sold, should be restored to her master. *La Nostra Segnora de la Piedad*, 25 Merlin, Jurisprudence, Prise Maritime, § 3, art. 1, 3 ; *S. C.* 1 Pistoye et Duverdy, Prises Maritimes, 331 ; 2 De Cussy, Droit Maritime, 166.

The English government, soon afterwards, more than once unqualifiedly prohibited the molestation of fishing vessels employed in catching and bringing to market fresh fish. On May 23, 1806, it was ' ordered in council, that all fishing vessels under Prussian and other colors, and engaged for the purpose of catching fish and conveying them fresh to market, with their crews, cargoes and stores, shall not be molested on their fishing voyages and bringing the same to market ; and that no fishing vessels of this description shall hereafter be molested. And the Right Honorable the Lords Commissioners of His Majesty's Treasury, the Lords Commissioners of the Admiralty and the Judge of the High Court of Admiralty are to give the necessary directions herein as to them may respectively appertain.' 5 C. Rob. 408. Again, in the order in council of May 2, 1810, which directed that ' all vessels which shall have cleared out from any port so far under the control of France or her allies as that British vessels may not freely trade thereat, and which are employed in the whale fishery, or other fishery of any description, save as hereinafter excepted, and are returning or destined to return either to the port from whence they cleared, or to any other port or place at which the British flag may not freely trade, shall be captured, and condemned together with their stores and cargoes, as prize to the captors,' there were excepted ' vessels employed in catching and conveying fish fresh to market, such vessels not being fitted or provided for the curing of fish.' Edw. Adm. appx. L.

Wheaton, in his Digest of the Law of Maritime Captures and Prizes,
p. 696 published in 1815, wrote : ' It has been usual | in maritime wars to exempt from capture fishing boats and their cargoes, both from views of mutual accommodation between neighboring countries, and from tenderness to a poor and industrious order of people. This custom, so honorable to the humanity of civilized nations, has fallen into disuse ; and it is remarkable that both France and England mutually reproach each other with that breach of good faith which has finally abolished it.' Wheaton on Captures, c. 2, § 18.

This statement clearly exhibits Wheaton's opinion that the custom had been a general one, as well as that it ought to remain so. His assumption that it had been abolished by the differences between France and England at the close of the last century was hardly justified by the state of things when he wrote, and has not since been borne out.

During the wars of the French Empire, as both French and English

writers agree, the coast fisheries were left in peace. 2 Ortolan, 54; De Boeck, § 193; Hall, § 148. De Boeck quaintly and truly adds, 'and the incidents of 1800 and of 1801 had no morrow—*n'eurent pas de lendemain.*'

In the war with Mexico in 1846, the United States recognized the exemption of coast fishing boats from capture. In proof of this, counsel have referred to records of the Navy Department, which this court is clearly authorized to consult upon such a question. *Jones* v. *United States*, 137 U. S. 202; *Underhill* v. *Hernandez*, 168 U. S. 250, 253.

By those records it appears that Commodore Conner, commanding the Home Squadron blockading the east coast of Mexico, on May 14, 1846, wrote a letter from the ship Cumberland, off Brazos Santiago, near the southern point of Texas, to Mr. Bancroft, the Secretary of the Navy, enclosing a copy of the commodore's 'instructions to the commanders of the vessels of the Home Squadron, showing the principles to be observed in the blockade of the Mexican ports,' one of which was that 'Mexican boats engaged in fishing on any part of the coast will be allowed to pursue their labors unmolested;' and that on June 10, 1846, those instructions were approved by the Navy Department, of which Mr. Bancroft was still the head, and continued to be until he was appointed Minister to | England p. 697
in September following. Although Commodore Conner's instructions and the Department's approval thereof do not appear in any contemporary publication of the Government, they evidently became generally known at the time, or soon after; for it is stated in several treatises on international law (beginning with Ortolan's second edition, published in 1853) that the United States in the Mexican War permitted the coast fishermen of the enemy to continue the free exercise of their industry. 2 Ortolan, (2d ed.) 49 note; (4th ed.) 55; 4 Calvo, (5th ed.) § 2372; De Boeck, § 194; Hall, (4th ed.) § 148.

As qualifying the effect of those statements, the counsel for the United States relied on a proclamation of Commodore Stockton, commanding the Pacific Squadron, dated August 20, 1846, directing officers under his command to proceed immediately to blockade the ports of Mazatlan and San Blas on the west coast of Mexico, and saying to them, 'All neutral vessels that you may find there you will allow twenty days to depart; and you will make the blockade absolute against all vessels, except armed vessels of neutral nations. You will capture all vessels under the Mexican flag that you may be able to take.' Navy Report of 1846, pp. 673, 674. But there is nothing to show that Commodore Stockton intended, or that the Government approved, the capture of coast fishing vessels.

On the contrary, General Halleck, in the preface to his work on International Law or Rules Regulating the Intercourse of States in Peace and War, published in 1861, says that he began that work, during the war between the United States and Mexico, 'while serving on the staff of the

commander of the Pacific Squadron ' and ' often required to give opinions on questions of international law growing out of the operations of the war.' Had the practice of the blockading squadron on the west coast of Mexico during that war, in regard to fishing vessels, differed from that approved by the Navy Department on the east coast, General Halleck could hardly have failed to mention it, when stating the prevailing doctrine upon the subject as follows : |

p. 698 ' Fishing boats have also, as a general rule, been exempted from the effects of hostilities. As early as 1521, while war was raging between Charles V and Francis, ambassadors from these two sovereigns met at Calais, then English, and agreed that, whereas the herring fishery was about to commence, the subjects of both belligerents, engaged in this pursuit, should be safe and unmolested by the other party, and should have leave to fish as in time of peace. In the war of 1800, the British and French governments issued formal instructions exempting the fishing boats of each other's subjects from seizure. This order was subsequently rescinded by the British government, on the alleged ground that some French fishing boats were equipped as gunboats, and that some French fishermen, who had been prisoners in England, had violated their parole not to serve, and had gone to join the French fleet at Brest. Such excuses were evidently mere pretexts, and, after some angry discussions had taken place on the subject, the British restriction was withdrawn, and the freedom of fishing was again allowed on both sides. French writers consider this exemption as an established principle of the modern law of war, and it has been so recognized in the French courts, which have restored such vessels when captured by French cruisers.' Halleck, (1st ed.) c. 20, § 23.

That edition was the only one sent out under the author's own auspices, except an abridgment, entitled Elements of International Law and the Law of War, which he published in 1866, as he said in the preface, to supply a suitable text-book for instruction upon the subject, ' not only in our colleges, but also in our two great national schools—the Military and Naval Academies.' In that abridgment, the statement as to fishing boats was condensed, as follows : ' Fishing boats have also, as a general rule, been exempted from the effects of hostilities. French writers consider this exemption as an established principle of the modern law of war, and it has been so recognized in the French courts, which have restored such vessels when captured by French cruisers.' Halleck's Elements, c. 20, § 21.

p. 699 In the treaty of peace between the United States and Mexico | in 1848 were inserted the very words of the earlier treaties with Prussia, already quoted, forbidding the hostile molestation or seizure in time of war of the persons, occupations, houses or goods of fishermen. 9 Stat. 939, 940.

Wharton's Digest of the International Law of the United States,

published by authority of Congress in 1886 and 1887, embodies General Halleck's fuller statement, above quoted, and contains nothing else upon the subject. 3 Whart. Int. Law Dig. § 345, p. 315; 2 Halleck, (Eng. eds. 1873 and 1878) p. 151.

France, in the Crimean War in 1854, and in her wars with Austria in 1859 and with Germany in 1870, by general orders, forbade her cruisers to trouble the coast fisheries, or to seize any vessel or boat engaged therein, unless naval or military operations should make it necessary. Calvo, § 2372; Hall, § 148; 2 Ortolan, (4th ed.) 449; 10 Revue de Droit International, (1878) 399.

Calvo says that in the Crimean War, 'notwithstanding her alliance with France and Italy, England did not follow the same line of conduct, and her cruisers in the Sea of Azof destroyed the fisheries, nets, fishing implements, provisions, boats, and even the cabins, of the inhabitants of the coast.' Calvo, § 2372. And a Russian writer on Prize Law remarks that those depredations, 'having brought ruin on poor fishermen and inoffensive traders, could not but leave a painful impression on the minds of the population, without impairing in the least the resources of the Russian government.' Katchenovsky, (Pratt's ed.) 148. But the contemporaneous reports of the English naval officers put a different face on the matter, by stating that the destruction in question was part of a military measure, conducted with the coöperation of the French ships, and pursuant to instructions of the English admiral 'to clear the seaboard of all fish stores, all fisheries and mills, on a scale beyond the wants of the neighboring population, and indeed of all things destined to contribute to the maintenance of the enemy's army in the Crimea;' and that the property destroyed consisted of large fishing establishments and storehouses of the Russian government, numbers of heavy launches, and enormous quantities of nets and gear, salted fish, corn | and other p. 700
provisions, intended for the supply of the Russian army. United Service Journal of 1855, pt. 3, pp. 108–112.

Since the English orders in council of 1806 and 1810, before quoted, in favor of fishing vessels employed in catching and bringing to market fresh fish, no instance has been found in which the exemption from capture of private coast fishing vessels, honestly pursuing their peaceful industry, has been denied by England, or by any other nation. And the Empire of Japan, (the last State admitted into the rank of civilized nations,) by an ordinance promulgated at the beginning of its war with China in August, 1894, established prize courts, and ordained that 'the following enemy's vessels are exempt from detention'—including in the exemption 'boats engaged in coast fisheries,' as well as 'ships engaged exclusively on a voyage of scientific discovery, philanthropy or religious mission. Takahashi, International Law, 11, 178.

International law is part of our law, and must be ascertained and administered by the courts of justice of appropriate jurisdiction, as often as questions of right depending upon it are duly presented for their determination. For this purpose, where there is no treaty, and no controlling executive or legislative act or judicial decision, resort must be had to the customs and usages of civilized nations; and, as evidence of these, to the works of jurists and commentators, who by years of labor, research and experience, have made themselves peculiarly well acquainted with the subjects of which they treat. Such works are resorted to by judicial tribunals, not for the speculations of their authors concerning what the law ought to be, but for trustworthy evidence of what the law really is. *Hilton* v. *Guyot*, 159 U. S. 113, 163, 164, 214, 215.

Wheaton places, among the principal sources of international law, 'Text-writers of authority, showing what is the approved usage of nations, or the general opinion respecting their mutual conduct, with the definitions and modifications introduced by general consent.' As to these he forcibly observes: 'Without wishing to exaggerate the importance of these writers, or to substitute, in any case, their authority for
p. 701 the principles of reason, it may be affirmed that they are generally | impartial in their judgment. They are witnesses of the sentiments and usages of civilized nations, and the weight of their testimony increases every time that their authority is invoked by statesmen, and every year that passes without the rules laid down in their works being impugned by the avowal of contrary principles.' Wheaton's International Law, (8th ed.) § 15.

Chancellor Kent says: 'In the absence of higher and more authoritative sanctions, the ordinances of foreign States, the opinions of eminent statesmen, and the writings of distinguished jurists, are regarded as of great consideration on questions not settled by conventional law. In cases where the principal jurists agree, the presumption will be very great in favor of the solidity of their maxims; and no civilized nation, that does not arrogantly set all ordinary law and justice at defiance, will venture to disregard the uniform sense of the established writers on international law.' 1 Kent Com. 18.

It will be convenient, in the first place, to refer to some leading French treatises on international law, which deal with the question now before us, not as one of the law of France only, but as one determined by the general consent of civilized nations.

'Enemy ships,' say Pistoye and Duverdy, in their Treatise on Maritime Prizes, published in 1855, 'are good prize. Not all, however; for it results from the unanimous accord of the maritime powers that an exception should be made in favor of coast fishermen. Such fishermen

are respected by the enemy, so long as they devote themselves exclusively to fishing.' 1 Pistoye et Duverdy, tit. 6, c. 1, p. 314.

De Cussy, in his work on the Phases and Leading Cases of the Maritime Law of Nations—*Phases et Causes Célèbres du Droit Maritime des Nations*—published in 1856, affirms in the clearest language the exemption from capture of fishing boats, saying, in lib. 1, tit. 3, § 36, that 'in time of war the freedom of fishing is respected by belligerents; fishing boats are considered as neutral; in law, as in principle, they are not subject either to capture or to confiscation;' and that in lib. 2, c. 20, he will state 'several facts and several decisions | which prove that the perfect p. 702 freedom and neutrality of fishing boats are not illusory.' 1 De Cussy, p. 291. And in the chapter referred to, entitled *De la Liberté et de la Neutralité Parfaite de la Pêche*, besides references to the edicts and decisions in France during the French Revolution, is this general statement: 'If one consulted only positive international law'—*le droit des gens positif*—(by which is evidently meant international law expressed in treaties, decrees or other public acts, as distinguished from what may be implied from custom or usage,) 'fishing boats would be subject, like all other trading vessels, to the law of prize; a sort of tacit agreement among all European nations frees them from it, and several official declarations have confirmed this privilege in favor of "a class of men whose hard and ill rewarded labor, commonly performed by feeble and aged hands, is so foreign to the operations of war."' 2 De Cussy, 164, 165.

Ortolan, in the fourth edition of his *Règles Internationales et Diplomatie de la Mer*, published in 1864, after stating the general rule that the vessels and cargoes of subjects of the enemy are lawful prize, says: 'Nevertheless, custom admits an exception in favor of boats engaged in the coast fishery; these boats, as well as their crews, are free from capture and exempt from all hostilities. The coast fishing industry is, in truth, wholly pacific, and of much less importance, in regard to the national wealth that it may produce, than maritime commerce or the great fisheries. Peaceful and wholly inoffensive, those who carry it on, among whom women are often seen, may be called the harvesters of the territorial seas, since they confine themselves to gathering in the products thereof; they are for the most part poor families who seek in this calling hardly more than the means of gaining their livelihood.' 2 Ortolan, 51. Again, after observing that there are very few solemn public treaties which make mention of the immunity of fishing boats in time of war, he says: 'From another point of view, the custom which sanctions this immunity is not so general that it can be considered as making an absolute international rule; but it has been so often put in practice, and, besides, it accords so well with the rule in use, in wars on | land, in regard to peasants p. 703

and husbandmen, to whom coast fishermen may be likened, that it will doubtless continue to be followed in maritime wars to come.' 2 Ortolan, 55.

No international jurist of the present day has a wider or more deserved reputation than Calvo, who, though writing in French, is a citizen of the Argentine Republic, employed in its diplomatic service abroad. In the fifth edition of his great work on international law, published in 1896, he observes, in § 2366, that the international authority of decisions in particular cases by the prize courts of France, of England, and of the United States, is lessened by the fact that the principles on which they are based are largely derived from the internal legislation of each country; and yet the peculiar character of maritime wars, with other considerations, gives to prize jurisprudence a force and importance reaching beyond the limits of the country in which it has prevailed. He therefore proposes here to group together a number of particular cases proper to serve as precedents for the solution of grave questions of maritime law in regard to the capture of private property as prize of war. Immediately, in § 2367, he goes on to say: 'Notwithstanding the hardships to which maritime wars subject private property, notwithstanding the extent of the recognized rights of belligerents, there are generally exempted, from seizure and capture, fishing vessels.' In the next section he adds: 'This exception is perfectly justiciable—*Cette exception est parfaitement justiciable*'—that is to say, belonging to judicial jurisdiction or cognizance. Littré, Dict. *voc.* Justiciable; *Hans* v. *Louisiana*, 134 U. S. 1, 15. Calvo then quotes Ortolan's description, above cited, of the nature of the coast fishing industry; and proceeds to refer, in detail, to some of the French precedents, to the acts of the French and English governments in the times of Louis XVI and of the French Revolution, to the position of the United States in the war with Mexico, and of France in later wars, and to the action of British cruisers in the Crimean War. And he concludes his discussion of the subject, in § 2373, by affirming the exemption of the coast fishery, and pointing out the distinction in this regard between the
p. 704 coast fishery and | what he calls the great fishery, for cod, whales or seals, as follows: 'The privilege of exemption from capture, which is generally acquired by fishing vessels plying their industry near the coasts, is not extended in any country to ships employed on the high sea in what is called the great fishery, such as that for the cod, for the whale or the sperm whale, or for the seal or sea calf. These ships are, in effect, considered as devoted to operations which are at once commercial and industrial—*Ces navires sont en effet considérés comme adonnés à des opérations à la fois commerciales et industrielles.*' The distinction is generally recognized. 2 Ortolan, 54; De Boeck, § 196; Hall, § 148. See also *The Susa*, 2 C. Rob. 251; *The Johan*, Edw. Adm. 275, and appx. L.

The modern German books on international law, cited by the counsel for the appellants, treat the custom, by which the vessels and implements of coast fishermen are exempt from seizure and capture, as well established by the practice of nations. Heffter, § 137 ; 2 Kaltenborn, § 237, p. 480 ; Bluntschli, § 667 ; Perels, § 37, p. 217.

De Boeck, in his work on Enemy Private Property under Enemy Flag—*de la Propriété Privée Ennemie sous Pavillon Ennemi*—published in 1882, and the only continental treatise cited by the counsel for the United States, says in § 191 : ' A usage very ancient, if not universal, withdraws from the right of capture enemy vessels engaged in the coast fishery. The reason of this exception is evident ; it would have been too hard to snatch from poor fishermen the means of earning their bread.' ' The exemption includes the boats, the fishing implements and the cargo of fish.' Again, in § 195 : ' It is to be observed that very few treaties sanction in due form this immunity of the coast fishery.' ' There is, then, only a custom. But what is its character ? Is it so fixed and general that it can be raised to the rank of a positive and formal rule of international law ? ' After discussing the statements of other writers, he approves the opinion of Ortolan (as expressed in the last sentence above quoted from his work) and says that, at bottom, it differs by a shade only from that formulated by Calvo and by some of the German jurists, and that ' it is more exact, | without ignoring the imperative p. 705
character of the humane rule in question—*elle est plus exacte, sans méconnaître le caractère impératif de la règle d'humanité dont il s'agit.*' And, in § 196, he defines the limits of the rule as follows : ' But the immunity of the coast fishery must be limited by the reasons that justify it. The reasons of humanity and of harmlessness—*les raisons d'humanité et d'innocuité*—which militate in its favor do not exist in the great fishery, such as the cod fishery ; ships engaged in that fishery devote themselves to truly commercial operations, which employ a large number of seamen. And these same reasons cease to be applicable to fishing vessels employed for a warlike purpose, to those which conceal arms, or which exchange signals of intelligence with ships of war ; but only those taken in the fact can be rigorously treated ; to allow seizure by way of prevention would open the door to every abuse, and would be equivalent to a suppression of the immunity.'

Two recent English text-writers, cited at the bar, (influenced by what Lord Stowell said a century since,) hesitate to recognize that the exemption of coast fishing vessels from capture has now become a settled rule of international law. Yet they both admit that there is little real difference in the views, or in the practice, of England and of other maritime nations ; and that no civilized nation at the present day would molest coast fishing vessels, so long as they were peaceably pursuing their

calling, and there was no danger that they or their crews might be of military use to the enemy. Hall, in § 148 of the fourth edition of his Treatise on International Law, after briefly sketching the history of the positions occupied by France and England at different periods, and by the United States in the Mexican War, goes on to say: 'In the foregoing facts there is nothing to show that much real difference has existed in the practice of the maritime countries. England does not seem to have been unwilling to spare fishing vessels so long as they are harmless, and it does not appear that any State has accorded them immunity under circumstances of inconvenience to itself. It is likely that all nations would now refrain from molesting them as a general
p. 706 rule, and would capture | them so soon as any danger arose that they or their crews might be of military use to the enemy; and it is also likely that it is impossible to grant them a more distinct exemption.' So T. J. Lawrence, in § 206 of his Principles of International Law, says: 'The difference between the English and the French view is more apparent than real; for no civilized belligerent would now capture the boats of fishermen plying their avocation peaceably in the territorial waters of their own State; and no jurist would seriously argue that their immunity must be respected if they were used for warlike purposes, as were the smacks belonging to the northern ports of France when Great Britain gave the order to capture them in 1800.'

But there are writers of various maritime countries, not yet cited, too important to be passed by without notice.

Jan Helenus Ferguson, Netherlands Minister to China, and previously in the naval and in the colonial service of his country, in his Manual of International Law for the Use of Navies, Colonies and Consulates, published in 1882, writes: 'An exception to the usage of capturing enemy's private vessels at sea is the coast fishery.' 'This principle of immunity from capture of fishing boats is generally adopted by all maritime powers, and in actual warfare they are universally spared so long as they remain harmless.' 2 Ferguson, § 212.

Ferdinand Attlmayr, Captain in the Austrian Navy, in his Manual for Naval Officers, published at Vienna in 1872 under the auspices of Admiral Tegetthoff, says: 'Regarding the capture of enemy property, an exception must be mentioned, which is a universal custom. Fishing vessels which belong to the adjacent coast, and whose business yields only a necessary livelihood, are, from considerations of humanity, universally excluded from capture.' 1 Attlmayr, 61.

Ignacio de Negrin, First Official of the Spanish Board of Admiralty, in his Elementary Treatise on Maritime International Law, adopted by royal order as a text-book in the Naval Schools of Spain, and published at Madrid in 1873, concludes his chapter 'Of the lawfulness of prizes'

with these words : ' It remains to be added that the custom of all civilized peoples excludes from capture, and from all kind of hostility, the | fishing p. 707
vessels of the enemy's coasts, considering this industry as absolutely inoffensive, and deserving, from its hardships and usefulness, of this favorable exception. It has been thus expressed in very many international conventions, so that it can be deemed an incontestable principle of law, at least among enlightened nations.' Negrin, tit. 3, c. 1, § 310.

Carlos Testa, Captain in the Portuguese Navy and Professor in the Naval School at Lisbon, in his work on Public International Law, published in French at Paris in 1886, when discussing the general right of capturing enemy ships, says : ' Nevertheless, in this, customary law establishes an exception of immunity in favor of coast fishing vessels. Fishing is so peaceful an industry, and is generally carried on by so poor and so hardworking a class of men, that it is likened, in the territorial waters of the enemy's country, to the class of husbandmen who gather the fruits of the earth for their livelihood. The examples and practice generally followed establish this humane and beneficent exception as an international rule, and this rule may be considered as adopted by customary law and by all civilized nations.' Testa, pt. 3, c. 2, in 18 Bibliothèque International et Diplomatique, pp. 152, 153.

No less clearly and decisively speaks the distinguished Italian jurist, Pasquale Fiore, in the enlarged edition of his exhaustive work on Public International Law, published at Paris in 1885–6, saying : ' The vessels of fishermen have been generally declared exempt from confiscation, because of the eminently peaceful object of their humble industry, and of the principles of equity and humanity. The exemption includes the vessel, the implements of fishing, and the cargo resulting from the fishery. This usage, eminently humane, goes back to very ancient times ; and although the immunity of fishery along the coasts may not have been sanctioned by treaties, yet it is considered to-day as so definitely established, that the inviolability of vessels devoted to that fishery is proclaimed by the publicists as a positive rule of international law, and is generally respected by the nations. Consequently, we shall lay down the following rule : (*a*) Vessels belonging to citizens of the enemy State, and devoted to fishing | along the coasts, cannot be subject to p. 708
capture. (*b*) Such vessels, however, will lose all right of exemption, when employed for a warlike purpose. (*c*) There may, nevertheless, be subjected to capture vessels devoted to the great fishery in the ocean, such as those employed in the whale fishery, or in that for seals or sea calves.' 3 Fiore, § 1421.

This review of the precedents and authorities on the subject appears to us abundantly to demonstrate that at the present day, by the general consent of the civilized nations of the world, and independently of any

express treaty or other public act, it is an established rule of international law, founded on considerations of humanity to a poor and industrious order of men, and of the mutual convenience of belligerent States, that coast fishing vessels, with their implements and supplies, cargoes and crews, unarmed, and honestly pursuing their peaceful calling of catching and bringing in fresh fish, are exempt from capture as prize of war.

The exemption, of course, does not apply to coast fishermen or their vessels, if employed for a warlike purpose, or in such a way as to give aid or information to the enemy ; nor when military or naval operations create a necessity to which all private interests must give way.

Nor has the exemption been extended to ships or vessels employed on the high sea in taking whales or seals, or cod or other fish which are not brought fresh to market, but are salted or otherwise cured and made a regular article of commerce.

This rule of international law is one which prize courts, administering the law of nations, are bound to take judicial notice of, and to give effect to, in the absence of any treaty or other public act of their own government in relation to the matter.

Calvo, in a passage already quoted, distinctly affirms that the exemption of coast fishing vessels from capture is perfectly justiciable, or, in other words, of judicial jurisdiction or cognizance. Calvo, § 2368. Nor are judicial precedents wanting in support of the view that this exemption, or a somewhat analogous one, should be recognized and declared by a prize court. |

p. 709 By the practice of all civilized nations, vessels employed only for the purposes of discovery or science are considered as exempt from the contingencies of war, and therefore not subject to capture. It has been usual for the government sending out such an expedition to give notice to other powers ; but it is not essential. 1 Kent Com. 91, note ; Halleck, c. 20, § 22 ; Calvo, § 2376 ; Hall, § 138.

In 1813, while the United States were at war with England, an American vessel, on her voyage from Italy to the United States, was captured by an English ship, and brought into Halifax in Nova Scotia, and, with her cargo, condemned as lawful prize by the Court of Vice Admiralty there. But a petition for the restitution of a case of paintings and engravings, which had been presented to and were owned by the Academy of Arts in Philadelphia, was granted by Dr. Croke, the judge of that court, who said : ' The same law of nations, which prescribes that all property belonging to the enemy shall be liable to confiscation, has likewise its modifications and relaxations of that rule. The arts and sciences are admitted, amongst all civilized nations, as forming an exception to the severe rights of warfare, and as entitled to favor and protection. They are considered not as the peculium of this or of that

nation, but as the property of mankind at large, and as belonging to the common interests of the whole species.' And he added that there had been 'innumerable cases of the mutual exercise of this courtesy between nations in former wars.' *The Marquis de Somerueles*, Stewart Adm. (Nova Scotia) 445, 482.

In 1861, during the War of the Rebellion, a similar decision was made, in the District Court of the United States for the Eastern District of Pennsylvania, in regard to two cases of books belonging and consigned to a university in North Carolina. Judge Cadwalader, in ordering these books to be liberated from the custody of the marshal, and restored to the agent of the university, said: 'Though this claimant, as the resident of a hostile district, would not be entitled to restitution of the subject of a commercial adventure in books, the purpose of the shipment in question gives to it a different | character. The United States, in prose- p. 710
cuting hostilities for the restoration of their constitutional authority, are compelled incidentally to confiscate property captured at sea, of which the proceeds would otherwise increase the wealth of that district. But the United States are not at war with literature in that part of their territory.' He then referred to the decision in Nova Scotia, and to the French decisions upon cases of fishing vessels, as precedents for the decree which he was about to pronounce; and he added that, without any such precedents, he should have had no difficulty in liberating these books. *The Amelia*, 4 Philadelphia, 417.

In *Brown* v. *United States*, 8 Cranch, 110, there are expressions of Chief Justice Marshall which, taken by themselves, might seem inconsistent with the position above maintained of the duty of a prize court to take judicial notice of a rule of international law, established by the general usage of civilized nations, as to the kind of property subject to capture. But the actual decision in that case, and the leading reasons on which it was based, appear to us rather to confirm our position. The principal question there was whether personal property of a British subject, found on land in the United States at the beginning of the last war with Great Britain, could lawfully be condemned as enemy's property, on a libel filed by the attorney of the United States, without a positive act of Congress. The conclusion of the court was 'that the power of confiscating enemy property is in the legislature, and that the legislature has not yet declared its will to confiscate property which was within our territory at the declaration of war.' 8 Cranch, 129. In showing that the declaration of war did not, of itself, vest the executive with authority to order such property to be confiscated, the Chief Justice relied on the modern usages of nations, saying: 'The universal practice of forbearing to seize and confiscate debts and credits, the principle universally received that the right to them revives on the restoration of

peace, would seem to prove that war is not an absolute confiscation of this property, but simply confers the right of confiscation ;' and again : The
p. 711 modern rule then would seem to be that tangible property | belonging to an enemy, and found in the country at the commencement of war, ought not to be immediately confiscated ; and in almost every commercial treaty an article is inserted stipulating for the right to withdraw such property.' 8 Cranch, 123, 125. The decision that enemy property on land, which by the modern usage of nations is not subject to capture as prize of war, cannot be condemned by a prize court, even by direction of the executive, without express authority from Congress, appears to us to repel any inference that coast fishing vessels, which are exempt by the general consent of civilized nations from capture, and which no act of Congress or order of the President has expressly authorized to be taken and confiscated, must be condemned by a prize court, for want of a distinct exemption in a treaty or other public act of the Government.

To this subject, in more than one aspect, are singularly applicable the words uttered by Mr. Justice Strong, speaking for this court : ' Undoubtedly, no single nation can change the law of the sea. That law is of universal obligation, and no statute of one or two nations can create obligations for the world. Like all the laws of nations, it rests upon the common consent of civilized communities. It is of force, not because it was prescribed by any superior power, but because it has been generally accepted as a rule of conduct. Whatever may have been its origin, whether in the usages of navigation, or in the ordinances of maritime States, or in both, it has become the law of the sea only by the concurrent sanction of those nations who may be said to constitute the commercial world. Many of the usages which prevail, and which have the force of law, doubtless originated in the positive prescriptions of some single State, which were at first of limited effect, but which, when generally accepted, became of universal obligation.' ' This is not giving to the statutes of any nation extra-territorial effect. It is not treating them as general maritime laws ; but it is recognition of the historical fact that by common consent of mankind these rules have been acquiesced in as of general obligation. Of that fact, we think, we may take judicial notice. Foreign
p. 712 municipal laws | must indeed be proved as facts, but it is not so with the law of nations.' *The Scotia*, 14 Wall. 170, 187, 188.

The position taken by the United States during the recent war with Spain was quite in accord with the rule of international law, now generally recognized by civilized nations, in regard to coast fishing vessels.

On April 21, 1898, the Secretary of the Navy gave instructions to Admiral Sampson, commanding the North Atlantic Squadron, to

' immediately institute a blockade of the north coast of Cuba, extending from Cardenas on the east to Bahia Honda on the west.' Bureau of Navigation Report of 1898, appx. 175. The blockade was immediately instituted accordingly. On April 22, the President issued a proclamation, declaring that the United States had instituted and would maintain that blockade, ' in pursuance of the laws of the United States, and the law of nations applicable to such cases.' 30 Stat. 1769. And by the act of Congress of April 25, 1898, c. 189, it was declared that the war between the United States and Spain existed on that day, and had existed since and including April 21. 30 Stat. 364.

On April 26, 1898, the President issued another proclamation, which, after reciting the existence of the war, as declared by Congress, contained this further recital : ' It being desirable that such war should be conducted upon principles in harmony with the present views of nations and sanctioned by their recent practice.' This recital was followed by specific declarations of certain rules for the conduct of the war by sea, making no mention of fishing vessels. 30 Stat. 1770. But the proclamation clearly manifests the general policy of the Government to conduct the war in accordance with the principles of international law sanctioned by the recent practice of nations.

On April 28, 1898, (after the capture of the two fishing vessels now in question,) Admiral Sampson telegraphed to the Secretary of the Navy as follows : ' I find that a large number of fishing schooners are attempting to get into Havana from their fishing grounds near the Florida reefs and coasts. They are generally manned by excellent seamen, belonging | to the p. 713
maritime inscription of Spain, who have already served in the Spanish navy, and who are liable to further service. As these trained men are naval reserves, have a semi-military character, and would be most valuable to the Spaniards as artillerymen, either afloat or ashore, I recommend that they should be detained prisoners of war, and that I should be authorized to deliver them to the commanding officer of the army at Key West.' To that communication the Secretary of the Navy, on April 30, 1898, guardedly answered : ' Spanish fishing vessels attempting to violate blockade are subject, with crew, to capture, and any such vessel or crew considered likely to aid enemy may be detained.' Bureau of Navigation Report of 1898, appx. 178. The Admiral's despatch assumed that he was not authorized, without express order, to arrest coast fishermen peaceably pursuing their calling ; and the necessary implication and evident intent of the response of the Navy Department were that Spanish coast fishing vessels and their crews should not be interfered with, so long as they neither attempted to violate the blockade, nor were considered likely to aid the enemy.

The Paquete Habana, as the record shows, was a fishing sloop of

25 tons burden, sailing under the Spanish flag, running in and out of Havana, and regularly engaged in fishing on the coast of Cuba. Her crew consisted of but three men, including the master; and, according to a common usage in coast fisheries, had no interest in the vessel, but were entitled to two thirds of her catch, the other third belonging to her Spanish owner, who, as well as the crew, resided in Havana. On her last voyage, she sailed from Havana along the coast of Cuba, about two hundred miles, and fished for twenty-five days off the cape at the west end of the island, within the territorial waters of Spain; and was going back to Havana, with her cargo of live fish, when she was captured by one of the blockading squadron, on April 25, 1898. She had no arms or ammunition on board; she had no knowledge of the blockade, or even of the war, until she was stopped by a blockading vessel; she made no attempt to run the blockade, and no resistance at the time of the capture;
p. 714 nor was there any evidence | whatever of likelihood that she or her crew would aid the enemy.

In the case of the Lola, the only differences in the facts were that she was a schooner of 35 tons burden, and had a crew of six men, including the master; that after leaving Havana, and proceeding some two hundred miles along the coast of Cuba, she went on, about a hundred miles farther, to the coast of Yucatan, and there fished for eight days; and that, on her return, when near Bahia Honda, on the coast of Cuba, she was captured, with her cargo of live fish, on April 27, 1898. These differences afford no ground for distinguishing the two cases.

Each vessel was of a moderate size, such as is not unusual in coast fishing smacks, and was regularly engaged in fishing on the coast of Cuba. The crew of each were few in number, had no interest in the vessel, and received, in return for their toil and enterprise, two thirds of her catch, the other third going to her owner by way of compensation for her use. Each vessel went out from Havana to her fishing ground, and was captured when returning along the coast of Cuba. The cargo of each consisted of fresh fish, caught by her crew from the sea, and kept alive on board. Although one of the vessels extended her fishing trip across the Yucatan Channel and fished on the coast of Yucatan, we cannot doubt that each was engaged in the coast fishery, and not in a commercial adventure, within the rule of international law.

The two vessels and their cargoes were condemned by the District Court as prize of war; the vessels were sold under its decrees; and it does not appear what became of the fresh fish of which their cargoes consisted.

Upon the facts proved in either case, it is the duty of this court, sitting as the highest prize court of the United States, and administering the law of nations, to declare and adjudge that the capture

was unlawful, and without probable cause ; and it is therefore, in each case,

Ordered, that the decree of the District Court be reversed, and the proceeds of the sale of the vessel, together with the proceeds of any sale of her cargo, be restored to the claimant, with damages and costs. |

MR. CHIEF JUSTICE FULLER, with whom concurred MR. JUSTICE HARLAN and MR. JUSTICE MCKENNA, dissenting. p. 715

The District Court held these vessels and their cargoes liable because not ' satisfied that as a matter of law, without any ordinance, treaty or proclamation, fishing vessels of this class are exempt from seizure.'

This court holds otherwise, not because such exemption is to be found in any treaty, legislation, proclamation or instruction, granting it, but on the ground that the vessels were exempt by reason of an established rule of international law applicable to them, which it is the duty of the court to enforce.

I am unable to conclude that there is any such established international rule, or that this court can properly revise action which must be treated as having been taken in the ordinary exercise of discretion in the conduct of war.

It cannot be maintained ' that modern usage constitutes a rule which acts directly upon the thing itself by its own force, and not through the sovereign power.' That position was disallowed in *Brown* v. *The United States*, 8 Cranch, 110, 128, and Chief Justice Marshall said : ' This usage is a guide which the sovereign follows or abandons at his will. The rule, like other precepts of morality, of humanity and even of wisdom, is addressed to the judgment of the sovereign ; and although it cannot be disregarded by him without obloquy, yet it may be disregarded. The rule is, in its nature, flexible. It is subject to infinite modification. It is not an immutable rule of law, but depends on political considerations which may continually vary.'

The question in that case related to the confiscation of the property of the enemy on land within our own territory, and it was held that property so situated could not be confiscated without an act of Congress. The Chief Justice continued : ' Commercial nations, in the situation of the United States, have always a considerable quantity of property in the possession of their neighbors. When war breaks out, the question, what shall be done with enemy property in our country, is a | question p. 716 rather of policy than of law. The rule which we apply to the property of our enemy, will be applied by him to the property of our citizens. Like all other questions of policy, it is proper for the consideration of a department which can modify it at will ; not for the consideration of a department which can pursue only the law as it is written. It is proper for the consideration of the legislature, not of the executive or judiciary.'

This case involves the capture of enemy's property on the sea, and executive action, and if the position that the alleged rule *proprio vigore* limits the sovereign power in war be rejected, then I understand the contention to be that, by reason of the existence of the rule, the proclamation of April 26 must be read as if it contained the exemption in terms or the exemption must be allowed because the capture of fishing vessels of this class was not specifically authorized.

The preamble to the proclamation stated, it is true, that it was desirable that the war 'should be conducted upon principles in harmony with the present views of nations and sanctioned by their recent practice,' but the reference was to the intention of the Government 'not to resort to privateering, but to adhere to the rules of the Declaration of Paris;' and the proclamation spoke for itself. The language of the preamble did not carry the exemption in terms, and the real question is whether it must be allowed because not affirmatively withheld, or, in other words, because such captures were not in terms directed.

These records show that the Spanish sloop Paquete Habana 'was captured as a prize of war by the U. S. S. Castine' on April 25, and 'was delivered' by the Castine's commander 'to Rear Admiral Wm. T. Sampson, (commanding the North Atlantic Squadron,)' and thereupon 'turned over' to a prize master with instructions to proceed to Key West.

And that the Spanish schooner Lola 'was captured as a prize of war by the U. S. S. Dolphin,' April 27, and 'was delivered' by the Dolphin's commander 'to Rear Admiral Wm. T. Sampson, (commanding the North Atlantic Squadron,)' and thereupon 'turned over' to a prize master with instructions to proceed to Key West. |

p. 717 That the vessels were accordingly taken to Key West and there libelled, and that the decrees of condemnation were entered against them May 30.

It is impossible to concede that the Admiral ratified these captures in disregard of established international law and the proclamation, or that the President, if he had been of opinion that there was any infraction of law or proclamation, would not have intervened prior to condemnation.

The correspondence of April 28, 30, between the Admiral and the Secretary of the Navy, quoted from in the principal opinion, was entirely consistent with the validity of the captures.

The question put by the Admiral related to the detention as prisoners of war of the persons manning the fishing schooners 'attempting to get into Havana.' Non-combatants are not so detained except for special reasons. Sailors on board enemy's trading vessels are made prisoners because of their fitness for immediate use on ships of war. Therefore the Admiral pointed out the value of these fishing seamen to the enemy, and advised their detention. The Secretary replied that if the vessels referred

to were ' attempting to violate blockade ' they were subject ' with crew ' to capture, and also that they might be detained if ' considered likely to aid enemy.' The point was whether these crews should be made prisoners of war. Of course they would be liable to be if involved in the guilt of blockade running, and the Secretary agreed that they might be on the other ground in the Admiral's discretion.

All this was in accordance with the rules and usages of international law, with which, whether in peace or war, the naval service has always been necessarily familiar.

I come then to examine the proposition ' that at the present day, by the general consent of the civilized nations of the world, and independently of any express treaty or other public act, it is an established rule of international law, founded on considerations of humanity to a poor and industrious order of men, and of the mutual convenience of belligerent States, that coast fishing vessels, with their implements and supplies, cargoes and crews, unarmed, and honestly pursuing their peaceful calling p. 718 of catching and bringing in of fresh fish, are exempt from capture as prize of war.'

This, it is said, is a rule ' which prize courts, administering the law of nations, are bound to take judicial notice of, and to give effect to, in the absence of treaty or other public act of their own government.'

At the same time it is admitted that the alleged exemption does not apply ' to coast fishermen or their vessels, if employed for a warlike purpose, or in such a way as to give aid or information to the enemy ; nor when military or naval operations create a necessity to which all private interests must give way ; ' and further that the exemption has not ' been extended to ships or vessels employed on the high sea in taking whales or seals, or cod or other fish which are not brought fresh to market, but are salted or otherwise cured and made a regular article of commerce.'

It will be perceived that the exceptions reduce the supposed rule to very narrow limits, requiring a careful examination of the facts in order to ascertain its applicability ; and the decision appears to me to go altogether too far in respect of dealing with captures directed or ratified by the officer in command.

But were these two vessels within the alleged exemption ? They were of twenty-five and thirty-five tons burden respectively. They carried large tanks, in which the fish taken were kept alive. They were owned by citizens of Havana, and the owners and the masters and crew were to be compensated by shares of the catch. One of them had been two hundred miles from Havana, off Cape San Antonio, for twenty-five days, and the other for eight days off the coast of Yucatan. They belonged, in short, to the class of fishing or coasting vessels of from five to twenty

tons burden, and from twenty tons upwards, which, when licensed or enrolled as prescribed by the Revised Statutes, are declared to be vessels of the United States, and the shares of whose men, when the vessels are employed in fishing, are regulated by statute. They were engaged in what were substantially commercial ventures, and the mere fact that the fish
p. 719 were kept alive by contrivances | for that purpose—a practice of considerable antiquity—did not render them any the less an article of trade than if they had been brought in cured.

I do not think that, under the circumstances, the considerations which have operated to mitigate the evils of war in respect of individual harvesters of the soil can properly be invoked on behalf of these hired vessels, as being the implements of like harvesters of the sea. Not only so as to the owners but as to the masters and crews. The principle which exempts the husbandman and his instruments of labor, exempts the industry in which he is engaged, and is not applicable in protection of the continuance of transactions of such character and extent as these.

In truth, the exemption of fishing craft is essentially an act of grace, and not a matter of right, and it is extended or denied as the exigency is believed to demand.

It is, said Sir William Scott, ' a rule of comity only, and not of legal decision.'

The modern view is thus expressed by Mr. Hall : ' England does not seem to have been unwilling to spare fishing vessels so long as they are harmless, and it does not appear that any State has accorded them immunity under circumstances of inconvenience to itself. It is likely that all nations would now refrain from molesting them as a general rule, and would capture them so soon as any danger arose that they or their crews might be of military use to the enemy ; and it is also likely that it is impossible to grant them a more distinct exemption.'

In the Crimean War, 1854–5, none of the orders in council, in terms, either exempted or included fishing vessels, yet the allied squadrons swept the Sea of Azof of all craft capable of furnishing the means of transportation, and the English admiral in the Gulf of Finland directed the destruction of all Russian coasting vessels, not of sufficient value to be detained as prizes, except ' boats or small craft which may be found empty at anchor, and not trafficking.'

It is difficult to conceive of a law of the sea of universal obligation to
p. 720 which Great Britain has not acceded. And I | am not aware of adequate foundation for imputing to this country the adoption of any other than the English rule.

In his Lectures on International Law at the Naval Law College the late Dr. Freeman Snow laid it down that the exemption could not be asserted as a rule of international law. These lectures were edited by

Commodore Stockton and published under the direction of the Secretary of the Navy in 1895, and, by that department, in a second edition, in 1898, so that in addition to the well-known merits of their author they possess the weight to be attributed to the official imprimatur. Neither our treaties nor settled practice are opposed to that conclusion.

In view of the circumstances surrounding the breaking out of the Mexican War, Commodore Conner, commanding the Home Squadron, on May 14, 1846, directed his officers, in respect of blockade, not to molest 'Mexican boats engaged exclusively in fishing on any part of the coast,' presumably small boats in proximity to the shore · while on the Pacific coast Commodore Stockton in the succeeding August ordered the capture of 'all vessels under the Mexican flag.'

The treaties with Prussia of 1785, 1799 and 1828, and of 1848 with Mexico, in exempting fishermen, 'unarmed and inhabiting unfortified towns, villages or places,' did not exempt fishing vessels from seizure as prize; and these captures evidence the convictions entertained and acted on in the late war with Spain.

It is needless to review the speculations and repetitions of the writers on international law. Ortolan, De Boeck and others admit that the custom relied on as consecrating the immunity is not so general as to create an absolute international rule; Heffter, Calvo and others are to the contrary. Their lucubrations may be persuasive, but are not authoritative.

In my judgment, the rule is that exemption from the rigors of war is in the control of the Executive. He is bound by no immutable rule on the subject. It is for him to apply, or to modify, or to deny altogether such immunity as may have been usually extended. |

Exemptions may be designated in advance, or granted according to p. 721
circumstances, but carrying on war involves the infliction of the hardships of war at least to the extent that the seizure or destruction of enemy's property on sea need not be specifically authorized in order to be accomplished.

Being of opinion that these vessels were not exempt as matter of law, I am constrained to dissent from the opinion and judgment of the court; and my brothers Harlan and McKenna concur in this dissent.

On January 29, 1900, the court, in each case, on motion of the Solicitor General in behalf of the United States, and after argument of counsel thereon, and to secure the carrying out of the opinion and decree according to their true meaning and intent, ordered that the decree be so modified as to direct that the damages to be allowed shall be compensatory only, and not punitive.

The Newfoundland.

(176 U.S. Reports, 97) 1900.

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE DISTRICT OF SOUTH CAROLINA.

No. 156. Argued November 3, 6, 1899.—Decided January 15, 1900.

The question in this case is as to the adequacy of the proof offered on behalf of the Government and the captors to show that the Newfoundland was trying to violate the blockade of Havana, and the court is of opinion that it does not attain to that degree which affords a reasonable assurance of the justice of the sentence of forfeiture in the court below—that it raises doubts and suspicions and makes probable cause for the capture of the ship and justification of her captors, but not forfeiture.

p. 98 THE case is stated in the opinion of the court.

W. Theodore G. Barker for appellants. *Mr. G. A. R. Rowlings* was on his brief.

Mr. Assistant Attorney General Hoyt for appellee. *Mr. Joseph K. McCammon* and *Mr. James H. Hayden*, for the naval captors, were on his brief.

MR. JUSTICE MCKENNA delivered the opinion of the court.

The Newfoundland, a British steamship, was seized off the coast of Cuba on 19th July, 1898, by the United States ship of war Mayflower, on the ground that she was trying to violate the blockade of Havana. She was sent to Charleston, South Carolina, and there libelled with her cargo as prize of war. Testimony was taken *in preparatorio*, and the court determined it to be insufficient for condemnation, and on motion of the attorney for the United States ordered further proof.

Upon that proof a decree was entered condemning and forfeiting the ship and cargo, and they were ordered to be sold. From the decree this appeal is prosecuted. The assignments of error may be reduced to two contentions :

1. That the court erred in making an order for further proof because the testimony taken *in preparatorio* afforded no legal foundation for doubt, or proof of any overt act to justify the condemnation of the ship.

2. That the additional testimony taken still left the evidence insufficient for condemnation.

(1.) Of the testimony taken *in preparatorio* the court said :

'Taking the testimony which alone is now before the court, there is nothing in it which shows or tends to show that the Newfoundland, at the time of capture or at any other time, was heading for the port of Havana or any other port.'

And further :

'So far as its examination has extended, no case has been found where a sentence of condemnation was passed upon such a state of facts

as is presented in this record. How far | short the cases cited fall in p. 99
showing cause for condemnation, the circumstances hereinabove recited demonstrate. These circumstances do no more than create a suspicion that there was an intention to enter a Cuban port in violation of the blockade ; but suspicion, however well founded, is not proof, and cannot be accepted in any court in place of evidence.

' There must be some overt act denoting an attempt to do the thing forbidden, some fact in addition to the proved intention to commit the infraction, which shows that the unlawful intent is persisted in and is being carried into execution.

' As this court has in a recent case had occasion to remark, the testimony *in preparatorio* rarely affords opportunity for such proof. From the master's testimony it appears that Commander Mackenzie informed him that he had information, through a letter from the American consul at Halifax, that the Newfoundland sailed with intention to run the blockade. The court can form no opinion as to the probable weight of such testimony. It also appears that Commander Mackenzie thought the movements and conduct of the Newfoundland on the night of the capture suspicious. The court has personal acquaintance with Commander Mackenzie, and knows that in character, intelligence and attainments he is the peer of any officer of the navy ; but, highly as it values his opinion, it cannot accept it in lieu of proof ; it furnishes ground for ordering further evidence.'

It is urged by counsel for appellants that the court, therefore, based its order for further proof upon Commander Mackenzie's opinion, which, even if otherwise competent, was not in evidence. We, however, do not so interpret the remarks of the court. It is explicitly stated that the circumstances created a suspicion of an intention on the part of the ship to enter a Cuban port, but that the suspicion was insufficient for condemnation without some proof in addition showing an overt act, which, as testimony *in preparatorio* rarely afforded, further proof was ordered.

This was not an abuse of discretion, and is clearly within the ruling of *The Sir William Peel*, 5 Wall. 517, 534. In that case the court said the preparatory proof, which consisted | of the depositions of the master p. 100
of the ship, the mate and one seaman, ' clearly required restitution ' of the ship, and, declaring the rule, said, through Chief Justice Chase, that ' Regularly in cases of prize no evidence is admissible on the first hearing, except that which comes from the ship, either in the papers or the testimony of persons found on board.

' If upon this evidence the case is not sufficiently clear to warrant condemnation or restitution, opportunity is given by the court, either of its own accord or upon motion and proper grounds shown, to introduce additional evidence under an order for further proof.'

(2.) For a statement of the case we may quote from the opinions of the District Court. They clearly marshal and review all inculpating and exculpating circumstances, and give the impressions of the court of the character of witnesses the most important of whom testified in its presence. From the first opinion rendered on the testimony taken *in preparatorio* as follows: The Newfoundland 'cleared from Halifax, Nova Scotia, July 8, 1898, for Kingston, Jamaica, and Vera Cruz, Mexico. She carried a cargo of flour, pork, corn, wheat and canned goods shipped by David Robertson & Co. Bills of lading were issued to them for 4386 packages for Kingston, and 3747 for Vera Cruz. These bills of lading are indorsed by them in blank. The charter party was for a voyage of three months to ports of the United States, West Indies, Central and South America, etc., in the customary printed form, and written therein was 'including open Cuban ports, no contraband of war to be shipped,' and was to terminate at Halifax. Musgrave & Co. were the charterers.

'It appears from the master's testimony that he was instructed by the charterers to follow the directions of the shippers of the cargo, and he received from Robertson & Co., through the former captain, verbal instructions to clear for Kingston and Vera Cruz, and to proceed with all haste to the north coast of Cuba, and to enter either the port of Sagua
p. 101 la Grande or Caibairien, but on no account to enter any | blockaded port, and if he found the ports of Sagua and Caibairien blockaded, to proceed to Kingston and wire for instructions. It seems clear from this testimony that it was the intention of the shippers that the cargo was to be landed at Sagua or Caibairien, where the master was instructed that he would be met by pilots, and that Kingston and Vera Cruz were "contingent" or provisional destinations. Neither Sagua nor Caibairien were included among the Cuban ports in either of the President's proclamations notifying a blockade.

'The Newfoundland sailed from Halifax on July 9. Her speed is about eight knots; her registered tonnage, 567 tons. She steered for the "Crooked Inland Passage" in the Bahamas. Passing thence into the "old Bahama Channel" and going in the direction of Sagua and Caibairien, she reached a point northwestwardly from Neuvitas, on the north coast of Cuba, where she was stopped by the United States ship of war Badger at 12.45 A.M. on Monday, July 18. Her papers were examined by the boarding officer, who informed the master that the whole island of Cuba was blockaded, and was allowed to proceed upon her course.

'The island of Jamaica lies almost due south from Neuvitas, which, being about two hundred miles from the eastern end of the island of Cuba, it is contended that the Newfoundland should at that point have

changed her course and proceeded eastward around Cape Maysi and thence to Kingston. This, undoubtedly, would have been the shortest course, and if Kingston was the destination the sailing westward from Neuvitas would have carried the ship many hundreds of miles out of her course. It may be here observed that on the log book kept by the mate the line at the head of each page up to and including Monday, 18th July, is " Journal from Halifax, N. S., towards Kingston and Vera Cruz." On Tuesday, 19th July, the head line is " Journal from Halifax, N. S., towards Vera Cruz and Kingston." If after reaching Neuvitas there was an intention to go to Vera Cruz, the westwardly course would be the most direct.'

From the second opinion on final hearing, as follows :

' Lieutenant Evans, in command of the U. S. S. Tecumseh | testifies p. 102
that about 5 o'clock in the afternoon of July 19, while on his station in the first blockading squadron, six or eight miles to the north and eastward of Havana light and about three and a half miles from the nearest shore, he sighted the Newfoundland moving towards him on a westerly course ; that he immediately stood towards her at full speed, about ten knots, and overhauled her, sending his mate aboard to examine her papers. He estimates his position at the time as being latitude 23.15 north ; longitude 82.13, and on a diagram prepared by the navigating officer of the Mayflower, and offered in evidence, he fixes her position as being unquestionably within a dotted circle ; thinks that it was about the centre of the circle, but having taken no measurements at the time would not undertake to fix it closer than within three miles. He fixes the hour of boarding at 5.35, and says that he left her " in the vicinity of 6 o'clock," she bearing off on a course about west by half north. Mate Nickerson, of the Tecumseh, fixes her position at the time of sighting the Newfoundland at six to eight miles from Morro light and about three and a half to four miles from the nearest shore, the Newfoundland being at that time about nine miles to the northward and eastward, sailing west, the Tecumseh sailing about four miles to overhaul her. He fixes the hour of boarding at 5.35 exactly, and says that he returned aboard his ship about 5.50. He failed to enter upon the log of the Newfoundland the hour of boarding, as is usually and always should be done. He locates the point of boarding upon the diagram as does Lieutenant Evans ; saw the Newfoundland for about ten minutes after she stood off one or two points to the north of west, and says " it began to settle down dusk then."

' Ensign Pratt, of the Mayflower, whose watch began at 8 o'clock, testifies that about 8.20 he picked up a small light bearing north by west from him ; reported the same to the commanding officer, who ordered the ship headed for it north by west and the engines rung ahead

full speed. Shortly after heading for it the light was lost, but, standing on the same course about twenty minutes and putting on forced draft,
p. 103 the light was picked up again a little to the westward. Altering | his course and heading north-northwest, the light shortly disappeared again. He gradually changed his course to the westward until he headed about northwest, standing on that course about thirty minutes, still not seeing the light, when, about 9.10, he sighted it again, bearing southwest on his port beam and inshore ; headed for it again and stood on until about 9.30, when the light was seen outshore of him on his starboard beam, and headed for it again and came up with her at 10 o'clock. From subsequent developments it is clear that the light thus described was that of a lantern hanging on the wall of the companionway in the after deck-house of the Newfoundland, visible only when nearly abeam through the doors on either side. It would be open only to about three fourths of a point of the compass, and the Mayflower at full speed, making at times sixteen miles an hour, would pass the point of visibility, until by changing her course it would again become visible and be picked up, first on one quarter, then on the other. When the light was first seen the Mayflower was heading east-northeast and the light was bearing north by west from her, a point forward of the port beam, and estimated to be from two to three miles distant. No other lights were seen on the Newfoundland until she was overhauled. At that time all of the regulation lights were found to be burning brightly.

'Lieutenant Culver, navigating officer of the Mayflower, describes the chase substantially as above, and exhibits a tracing made on July 20, showing the estimated positions of the respective vessels at the time when the light was first discovered and at the time of the capture and the course sailed by each.

'Commander Mackenzie, of the Mayflower, was the senior officer of the blockade off Havana. The Mayflower covered about five points of the compass on the bearing from Morro light, and had been on that station during the month of July. He says that about 8.30 a faint light was reported about north by west of him, which he thought was a plain lantern. He describes the chase and locates the positions of the two
p. 104 vessels on the tracing prepared by Lieutenant Culver. From this | testimony and upon this diagram it would appear that the Newfoundland when boarded by the Tecumseh was at a point within a circle whose centre is ten and three fourths miles from Morro light, whose bearing was southwest one half west.

'The testimony from the Newfoundland relating to the same matter will now be stated.

'Captain Malcolm, the master, says that he was boarded by the mate of the Tecumseh fourteen miles off shore—off the nearest land—

while sailing on a westward course; that the boarding officer, after examining his papers, advised him not to go any nearer the land lest he should get a shell into him, and left him at 6.30; that thereafter he stood on a course one point north of west until 8 o'clock, when the Havana light bore about south by west, and from that time he put his ship back on a course due west, which he followed until boarded by the Mayflower. He exhibits a chart, on which he has marked his course, and says that at 8.30 he passed Havana light, being seventeen and one half miles from it; that at 10 o'clock, when boarded by the Mayflower, he was twenty-one miles from Havana light, which bore then southeast by south half south.

'Salkus, the mate of the Newfoundland, testifies to the boarding by the Tecumseh at 6.10, and that the Havana lighthouse and Morro Castle were not visible; that they started on their course at 6.30, and at 8.30 were abreast of Havana light, which bore south about sixteen or seventeen miles. In explanation of the entry in his log he says that he took no bearings at the time of the entry, and knew that the ship was farther off than ten miles. He says that at the time of the capture Morro light was not visible from the bridge, but that he saw it from the compass pole, fifteen feet above the bridge.

'Payne, the engineer, testified to the boarding by the Tecumseh at 6.10, and his log contains an entry showing that the engines stopped at 6.10 and started again at 6.30.

'It thus appears that there is a wide divergence in the testimony as to the point at which the Newfoundland was when boarded by the Tecumseh, and some divergence as to the time of such boarding.

'Lieutenant Evans and his mate fixed this location within | a circle p. 105
whose radius is three miles. They say that they are certain as to her location within three miles, and believe that she was about the centre of that circle, which is ten and a half miles from Morro light. Captain Malcolm and his mate fix the location at a point twenty-four miles from Morro light, thirteen and a half miles from the centre of the circle above referred to, and ten and a half miles from that point of the circle nearest to the Newfoundland.

'There is a marked discrepancy, and the first point to be decided is which is correct. Applying the usual tests by which testimony is weighed —the intelligence of the witnesses, their opportunities for knowing the truth, the likelihood of error arising from considerations of interest, and other influences which commonly sway men's minds—there can be no doubt that there is a preponderance of probability in favor of that side which, having no interest in the controversy, has the greater opportunity of knowledge.

'Lieutenant Evans and his mate were on cruising grounds with which

they were familiar. There could be no difficulty in ascertaining their position from the bearing of Morro, which was in plain sight day and night. They were within three or four miles of the shore, with well-defined objects from which bearings could be had. It was their manifest duty to know where they were, for they had to keep within certain prescribed limits. They are men of education, character and intelligence, and their testimony cannot be discredited without imputing to them a reckless carelessness for which there is no warrant.

'Neither Captain Malcolm nor his mate were familiar with the locality; the former had once before been to Havana; the latter, never. Their interest is obvious. I have no difficulty in coming to the conclusion that the preponderance of evidence fixes the position of the Newfoundland within the described circle when boarded by the Tecumseh. I am not so clear as to the time. The mate Nickerson fixes it at 5.35 precisely, and says that he returned to the Tecumseh at 5.50, but he says that he watched the Newfoundland for about ten minutes after she left, when 'it began to settle down dusk.' |

p. 106 'The sun set in that latitude on that day about 6.30, and there is little twilight.

'The officers of the Newfoundland fix the hour of boarding at 6.10 and the time of departure at 6.30, and these figures are entered upon the engineer's log. This log has been in possession of the claimant since the capture, and some erasures appear in another part which may hereafter call for comment, and it therefore cannot be accepted as absolute verity; but giving the ship the benefit of the reasonable doubt which the testimony warrants, assuming that she sailed at 6.30, she is next seen by Ensign Pratt about 8.20, when he sighted a small light bearing north by west from the Mayflower, whose station on the cruising ground lay next west of the Tecumseh, and whose position at that time was about six miles north by west from Morro light. This small light was estimated to be about two or three miles from the Mayflower. The mate of the Newfoundland made this entry upon her log: '8.30, Havana light bearing south ten miles.' If this testimony is taken as true, this would place the Newfoundland at a point seven miles from the centre of the circle adopted as the point of departure, and ten miles from the extreme western circumference of it, and it would follow that she had consumed two hours in making that distance. As her speed during her voyage was on an average nearly eight knots an hour, there is a considerable margin of time to be accounted for, which she endeavors to do by fixing her location at 8.30 at a point seventeen miles from Havana. This is the testimony of her master, and the mate concurs in it, saying that the entry in his log was not an accurate statement of the ship's position at that time; that it was only intended to show that she was at least ten miles from Havana

light. It is not necessary to discuss nor decide now how far a ship is concluded by the entries in her log. If the party making such entry is shown to have been drunk at the time or habitually careless, or if made in a perfunctory way, without observations or the opportunity of observation, little weight might be given it ; but the log being intended to be a correct record of the facts contained therein, an entry made with full knowledge and opportunity of ascertaining | the truth must be accepted p. 107
as the truth if it tells against the party making it, and can be denied no more than a deed. If it is the result of a mistake, there must be conclusive evidence of the mistake. It is sufficient to say that such evidence has not been adduced here, and the entry upon the log, confirmed as it is by the testimony from the Mayflower, fixes the position of the Newfoundland at 8.30 at a point about ten miles from Havana light. From that point to the point of seizure her course can be marked with sufficient accuracy. That she sailed on a straight course from 8.30 to 10 o'clock, and that such course led her away from the entrance into the port of Havana, is entirely clear, whether the point was seventeen miles from Morro light, as claimed by the Mayflower, or twenty-one miles, as claimed by the Newfoundland, or eighteen miles, as agreed upon by her master and Ensign Pratt as the point from which they took their departure after the seizure, when they started upon their voyage to Charleston.

' The next incriminating charge is that the Newfoundland was sailing without lights. Ensign Pratt, who first sighted her, says he picked up a small light. All the witnesses from the Mayflower describe this light as that from an ordinary lantern, and not the masthead light. None of these witnesses saw any of the regulation lights until they came up with her, about 10 o'clock, when they were all brightly burning. After the chase began these regulation running lights, being visible only two points abaft the beam, would naturally not be seen.

' Coming westward from the point where she left the Tecumseh to the point where the faint light was sighted, her masthead light, whose visibility by the regulations is at least five miles, should certainly have been seen if there was proper vigilance aboard the Mayflower. That Ensign Pratt was vigilant is demonstrated by the fact that he picked up the dim light two or three miles off at 8.20. He went on duty at 8 o'clock. The officer who had the watch before that hour was not examined, nor were the lookouts, who are described by Commander Mackenzie as uncommonly efficient men. As it is, the testimony leaves this question open to reasonable | doubt. While it is probable that the masthead light, p. 108
if burning and not screened, would have been visible to Ensign Pratt at the time he descried the small light, he does not say with certainty that it would have been, there being but a narrow limit of visibility.

' The witnesses from the Newfoundland, including the sailor who lit

them, all testify that the lights were lit at the usual hour and they were all burning when she was overhauled.

'Commander Mackenzie and other witnesses from the Mayflower all testify that the small light already described was the only one seen; that there were no stray lights, such as are commonly seen aboard a steamer in the night time.

'Taking the point of departure to be somewhere within the circle already described and the time of departure at 6.30 and the rate of speed at nearly eight knots, and following the courses described—west by north until 8 o'clock, and then due west until 10 o'clock—and plotting it upon the chart, I must conclude that she would have been some miles farther west than either the point claimed by her or the point testified to by the officers of the Mayflower as the point of capture at 10 o'clock, unless she had loitered somewhere upon her route.

'Outside the domain of the exact sciences, absolute certainty is rarely attainable, and there must always be an element of doubt as to every transaction the proof of which rests upon fallible human testimony, nowhere more fallible than in estimates of location and distances upon water.

* * * * *

'We will now look into the character and conduct of the Newfoundland to see whether her presence off Havana is consistent with innocent intent.

'She is a small steamship, lately employed in the sealing business. She sailed from Halifax, July 9, loaded with a cargo of provisions, under command of Captain Malcolm, who was employed for that voyage. She had two clearances, one for Kingston and one for Vera Cruz. Commander Mackenzie testifies that it is not the practice of any American custom
p. 109 house to give two clearances. Captain Malcolm says that this | is not unusual in Halifax, and that he has generally had separate clearances for separate ports, sometimes five or six, whenever he had cargo for each. We have no statute prescribing any regulation on this subject, and wherever a ship has separate cargo for separate ports I can see no reason why she should not have a clearance for each, and I am informed that it is the custom at this port to give such separate clearances. While I cannot hold that separate clearances for Kingston and Vera Cruz were in themselves suspicious, it is a cause of grave and just suspicion that her real and primary destination was to neither of those ports, as subsequent events proved. Captain Malcolm, in his testimony *in preparatorio*, said that his verbal instructions were to sail for Caibairien or Sagua la Grande, and if those ports were blockaded to go to Kingston and cable for orders. For reasons, into which it is not the province of this court to inquire, neither Sagua nor Caibairien were included among the ports blockaded under the proclamation of the President, and he had the right to go to

either. Whether in so doing without proper clearances he would have incurred penalties under the municipal regulations of Great Britain or of Spain is not within the scope of this inquiry, certain it is that he would have committed no offence cognizable here.

'Taking his course to the southward, he next appears off Neuvitas, where he is boarded by Lieutenant Titus, of the U. S. S. Badger, and is informed by him that the whole coast of Cuba is blockaded. The case is not presented in an aspect which requires any determination of the question whether that sort of a blockade was effective or legal, as he did not go to either Sagua or Caibairien for the purpose of testing its validity, which he might well have done. According to his testimony *in preparatorio*, and it is repeated on this hearing, he abandoned all thought of entering either of those ports upon hearing that they were blockaded. His course, then, should have been around the eastern end of the island of Cuba to Kingston, by way of Cape Maysi, for the course around the western end, by Cape Antonio, was nearly a thousand miles further. In these days of sharp competition intelligent | men do not make such p. 110
long detours in the prosecution of legitimate business. The explanation given is that he wanted to satisfy his charterers by showing them that he had passed by the port to which he was directed to go, and, further, that he apprehended that he would subject himself to suspicion by changing his course at that time. The answer to this is obvious. His charterers did not instruct him to go by the ports of Sagua and Caibairien, but to go to them, and if he did not intend to do that his proceeding in that direction was such a futile, time-consuming and coal-consuming venture that it staggers credulity to accept it as the true reason; nor does the other reason given seem much more satisfactory. There was nothing unlawful in his setting out for Sagua or any other open port in Cuba, and if, after information of the blockade, it became necessary to change his course in order to go by the shortest route to Kingston, his contingent destination, there would have been no risk in disclosing the truth. In this, as in most of the affairs of life, the straightforward course would have been the wisest course. That it was not taken suggests the conclusion that neither Sagua nor Caibairien was the real destination. It appears from the testimony that neither at the time of capture nor afterwards was anything ever heard about Sagua or Caibairien until it came out in the examination of Captain Malcolm before the prize commissioners. None of the other officers of the ship appear to have known about it. The mate seems to have thought that they were going to Vera Cruz. In the engineer's log there appears every day from July 9th to July 18th, inclusive, a line at the top of the page containing the words, 'from Halifax to Vera Cruz and —— Cuba.' The word 'Kingston' is written over and partially obliterates the word 'Cuba.' There is a blank space

before the word 'Cuba,' evidently intended to be filled in. 'Havana' would about fill it. The engineer appeared to be the most intelligent man on the ship after the master. From the entry on his log it is plain that he knew that the ship's destination was Cuba, and there would seem to be no good reason why the name of the port should have been left
p. 111 blank if it was Sagua or any other open port. In the | absence of any testimony confirming the master's statement that his instructions were to go to Sagua or Caibairien, and there being nothing in his conduct showing that that was his real destination, I must hold it to have been a pretensive destination, and his appearance before Havana is therefore not satisfactorily explained.

'Lieutenant Culver, of the Mayflower, who boarded her, says that when he asked Captain Malcolm where he was bound he was very vague in his replies, sometimes saying Kingston and sometimes saying Vera Cruz, and when asked whether he was shaping his course by way of Cape San Antonio he replied he hadn't made up his mind. In the same conversation he said that he had been making eight knots an hour from the time he was boarded by the Tecumseh to time of overhauling. To Commander Mackenzie, on the Mayflower, he said he was making for Vera Cruz, if he had coal enough, and then to Kingston. If he did not have enough coal, he was going to Kingston in order to take on coal. To Lieutenant Pratt, the prize master on the voyage up to Charleston, he said that he was bound for Vera Cruz.

'Captain Malcolm says, in his testimony, that his instructions were to go to Kingston if he found the ports of Sagua and Caibairien blockaded, and from there he was to cable for instructions, and that Kingston was his destination; that he had plenty of coal to get to Kingston, but not enough to go to Vera Cruz and then Kingston.

'It must be conceded that there is no proof of any attempt to enter the port of Havana—that is to say, no witness has testified to seeing her heading that way. It must also be admitted that the testimony as to loitering falls very far short of the proof offered in the Neutralitet, the Apollo, the Charlotte Christine, the Gute Erwartung, the cases relied on by the government.'

The application of a more stringent rule to the Newfoundland than was applied in those cases was justified by the court on the ground that steam vessels have greater power of eluding blockades than sailing vessels possess.

p. 112 The conclusion of the court was that the evidence established | that the ship was loitering about the coast seeking an opportunity to violate the blockade. Conceding, *arguendo*, that this was enough for her condemnation, we think the fact is very disputable. It is based upon the ship's nearness to the coast, the slowness of her movements deduced from

her position when the Tecumseh boarded her and when the Mayflower captured her, and the taking of a longer route to Kingston than might have been selected.

These circumstances may be explained consistently with innocence. Against them the fact remains that she made no attempt to enter any Cuban port. She sailed by Caibairien. She sailed by Sagua, although a railroad connected it with Havana, and made it inviting to contraband enterprise. And she had sailed beyond Havana when she was captured. But it is argued she must have loitered, and with guilty intention because she ran only twelve miles in three hours, when she ought to have run twenty-four miles.

In this conclusion there are disputes of fact as well as disputes of inference. It depends upon the time it was and where she was when the Tecumseh boarded her—the time it was and where she was when the Mayflower seized her ; and granting a decision of these as contended for by the Government, there are the elements of a varying course in the night and the retarding influence of the current to account for the time.

The fact of going around Cuba to Kingston instead of turning back after she was boarded by the Tecumseh, is from our present view not completely accounted for. But our situation, it must be remembered, was not Captain Malcolm's situation. It was his view, he testified, of his duty to his employers. It was his way to avoid exciting the suspicion of the officers of the Tecumseh ; and, in another place, without peril or responsibility for that or some other decision, we are not prepared to say that it is necessarily proof of guilt. After experience it is often easy to see that something else should have been done than that which was done, but judging Captain Malcolm in his situation, was there not presented to him a fair conflict of reasons ? It is very certain, if doubt came to him what | to do, he would avoid the hazard of the seizure of his ship at the p. 113
comparatively small sacrifice of the coal and time which would be consumed by going to Kingston the longer way.

It is further urged that when the Newfoundland was seen and pursued by the Mayflower she had not her usual lights displayed. This, the District Court said, the testimony left in reasonable doubt. ' While it is probable,' it was said, ' that the masthead light, if burning and not screened, would have been visible to Ensign Pratt at the time he descried the small light, he does not say with certainty that it would have been, there being but a narrow limit of possibility.' The limit was as narrow to all other officers of the pursuing vessel and the possibilities it afforded must be considered as at least balanced by the positive testimony of all on board of the Newfoundland, including the sailor who lit them at the usual hour, and the fact that they were all burning when she was overhauled.

But it may be said that the ship has too many suspicious circum-

stances to account for, and that we overlook the probative strength arising from their number and their concurrence; that if each one standing alone can be explained, all together unerringly point to the guilt of the ship. We appreciate the force of the argument, but cannot carry it so far. And yet we have no desire to impair the effectiveness of blockades by declaring a more indulgent rule than that of prior cases nor permit experiment with opportunities to break into blockaded ports. But there should be some tangible proof of such intention—a more definite demonstration than this record exhibits. As we have already seen, the learned trial judge was constrained to say 'that the testimony as to loitering falls very far short of the proof offered in the Neutralitet, the Apollo, the Charlotte Christine, the Gute Erwartwig, the cases relied on by the government.' Their application, however, to the case at bar, whose facts 'fall far short' of their facts, is insisted on because of the difference between the power of steam vessels and the power of sailing vessels. Undoubtedly there is a difference, but if steam has increased
p. 114 the power of blockade runners, it has increased in greater degree | when conjoined with the range of modern ordnance, the power of blockade defenders. We recently had occasion to consider their power, and decide that a single modern cruiser might make a blockade effective. *The Olinde Rodrigues*, 174 U. S. 510.

The question in this case, then, is as to the adequacy of the proof, and we do not think it attains that degree which affords a reasonable assurance of the justice of the sentence of forfeiture. It raises doubts and suspicions—makes probable cause for the capture of the ship and justification of her captors, but not forfeiture. *The Olinde Rodrigues, supra.*

It follows, therefore, that the decree of the District Court must be reversed and the cause remanded, with directions to enter a decree restoring the vessel and cargo, or if they have been sold, the proceeds of the sale, but without damages or costs, and it is so ordered.

The Adula.

(176 U.S. Reports, 361) 1900.

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE SOUTHERN DISTRICT OF GEORGIA.

No. 167. Argued November 7, 1899.—Decided February 26, 1900.

A legal blockade may be established by a naval officer acting upon his own discretion, or under direction of superiors, without governmental notification.

In view of the operations being carried on for the purpose of destroying or capturing the Spanish fleet at Santiago de Cuba, and the reduction of that place, it was competent for the Admiral commanding the squadron to establish a blockade there, and at Guantanamo, as an adjunct to such operations, and such blockade was valid as against all vessels having notice thereof.

It appearing that Guantanamo was eighteen miles from the mouth of Guantanamo Bay and was still occupied by the enemy, *held*, that although the American troops occupied the mouth of the bay, the blockade was still operative as to vessels bound to the city of Guantanamo. p. 362

The legal effect of a lawful and sufficient blockade is a closing of the port, and an interdiction of the entrance of all vessels of whatever nationality or business.

The sailing of a vessel with a premeditated intent to violate a blockade, is *ipso facto* a violation of the blockade, and renders her subject to capture from the moment she leaves the port of departure.

If a master has actual notice of a blockade, he is not at liberty even to approach the blockaded port for the purpose of making inquiries.

If a neutral vessel be chartered to an enemy, she becomes to a certain extent and *pro hac vice* an enemy's vessel, and a notice to her charterer of the existence of a blockade is a notice to the vessel.

It appearing in this case that both the charterer and the vessel had been previously engaged in bringing away refugees from Cuba, and were chargeable with notice of the military and naval operations against that island, that such facts were of common knowledge at the port from which she sailed, and that intercourse with Cuban ports was dangerous; and it appearing from a preponderance of evidence that both the charterer and master of the vessel had knowledge of the blockade: *held*, that the vessel was properly condemned.

If an examination of the ship's papers and the testimony of the crew, taken *in preparatorio*, make a case for condemnation, an order for further proof is only made where the interests of justice clearly require it: *held*, in this case that there was no error in denying the motion of the claimant for further proofs.

THIS was a libel in prize against the British steamship Adula, then under charter to a Spanish subject, which was seized June 29, 1898, by the United States cruiser Marblehead, for attempting to run the blockade established at Guantanamo Bay in the island of Cuba, and was subsequently sent into the port of Savannah for adjudication.

The Adula, a vessel of 372 tons, was built at Belfast in 1889, for her owner, the Atlas Steamship Company, Limited, a British corporation, and was registered in the name of its managing director, Sir William Bowers Forwood. Prior to the American-Spanish war she was engaged in general trade between Kingston and other ports on the coast of Jamaica, and from time to time had made voyages to Cuban ports. After the breaking out of the war the steamer was chartered by various persons in the intervals of its regular work, for voyages to Cuba.

In the meantime, however, under the command of Rear Admiral Sampson, a blockade was established at Santiago, where the Spanish fleet lay under the command of Admiral Cervera. Upon June 8, a blockade of Guantanamo Bay was also established by order of Admiral Sampson, the blockading squadron being under the command of Commander McCalla. Both of these blockades were maintained during the war. On April 22, a blockade of the north coast of Cuba between Cardenas and Bahia Honda and of Cienfuegos on the south coast, was declared by the President. On June 27, the President by proclamation gave notice that the Cuban blockade had been extended to include all the ports on the p. 363

southern coast between Cape Frances and Cape Cruz. This included the port of Manzanillo. On the 28th, this proclamation was made known to the vessels off Guantanamo.

On June 27, the Adula, then at Kingston, was engaged in taking on a cargo for shipment. On the 28th she discharged this cargo, and the agent of the Atlas Company entered into a charter party with one Solis, a Spanish subject formerly resident in Manzanillo, of the material parts of which the following is a copy :

The Adula was put at the disposal of the charterer ' for the conveyance of passengers from Cuban ports hereinafter to be named, to Kingston. The ports that the vessel is to go to are Manzanillo, Santiago and Guantanamo ; but it is distinctly understood and agreed by the parties aforesaid that it shall not be deemed a breach of this agreement should the steamer be prevented from entering any of those ports from causes beyond the control of the company, but that should she be able to enter one or all of them, she shall embark the passengers that the charterer shall engage for her and proceed on her voyage. If she is not permitted to enter either Manzanillo, Santiago or Guantanamo, the vessel is to return to Kingston, and the voyage shall be considered completed, and the charter money hereinafter referred to earned without any deductions. . . . The charterer is to provide a good and efficient government pilot to conduct the ship safely into the ports which have been named.
p. 364 Should she be permitted to | enter them the charterer guarantees that the proper and efficient clearances shall be obtained for each port, so that the ship shall not be subjected to any fines for breach of regulations. . . . The company will give the option to the charterer for another voyage similar to this on similar terms, providing the charterer gives the company twenty-four hours' notice after the arrival of the steamer at Kingston.'

Accompanying this charter were certain instructions, printed in the margin,[1] from the agent of the company to Captain Yeates, the

[1] ATLAS STEAMSHIP COMPANY,
JAMAICA AGENCY, *June* 28, 1898.

Captain Yeates, S. S. Adula.

DEAR SIR : I enclose herein a copy of the agreement under which your vessel is proceeding on, and on board the ship will be the charterer, to whom I now introduce you, Mr. José R. Solis, and I ask you to show him every attention on the voyage.

You will see by a perusal of the agreement that you are on a voyage wholly and solely for the conveyance of refugees from the ports named to Kingston.

On your arrival at Guantanamo, to which port you will proceed direct, you will find, no doubt, American warships off the port. You will, when signalled to, stop immediately and communicate to the commanding officer the voyage that you are on, and, in fact, you can show him these sailing orders, and I do not think that the commanding officer will make any trouble whatever to your continuing the voyage into the port.

You must be careful on your arrival there not to interfere or in any way make any observation or sketches of anything that you may see or hear of, but adhere strictly to the duties of your ship.

At Guantanamo it is likely there may be some difficulty in obtaining a pilot, and if the commanding officer gives you permission to proceed it is just possible

commander of the Adula. These were taken from | the ship when she p. 365
was captured. The Adula left Kingston late in the afternoon of June 28. Before sailing, Solis asked from the United States consul at Kingston a permit to enter the ports of Guantanamo, Santiago and Manzanillo. This the consul refused to give without special instructions from Washington. Just before sailing to Santiago, Solis cabled for a licensed pilot to meet the Adula. On leaving Kingston she took her course around Morant Point at the easterly end of the island, first toward Santiago, and then to Guantanamo, and about 4 P.M. of the following day was met before reaching the harbor and brought to by the steamship Vixen ; was directed to proceed, entered the harbor of Guantanamo, and was seized by the Marblehead, which, with other vessels of the fleet, was lying inside the bay, and was sent to Savannah, where a libel in prize was filed against her on July 21, 1898. The depositions *in preparatorio* were taken July 21, and her owner, the Atlas Steamship Company, appeared as claimant and filed its answer. The case was heard upon the proofs *in preparatorio*, and a decree of condemnation entered July 28. (89 Fed. Rep. 351.) Before the decree, claimant moved for leave to take further proofs. The court set the motion down for August 9, giving claimant leave to serve such affidavits and other papers as it might desire to read upon the motion, and directed the entry of the decree to be without prejudice to such motion. The motion was finally denied, and the vessel released upon a stipulation for her value.

From the decree of condemnation her owner and claimant appealed to this court.

Mr. Everett P. Wheeler for appellant. |

Mr. James H. Hayden for the captors. *Mr. Joseph K. McCammon* p. 366
was on his brief

Mr. Assistant Attorney General Hoyt for the United States.

that he may be able to tell you where you can obtain the services of a pilot to go in.

From Guantanamo you will proceed to off Santiago. Here you will meet the other fleet, and carry the same instructions out with them as I have mentioned to you in reference to Guantanamo. The charterer is telegraphing at once to Santiago for a pilot to come off to meet the ship, if permission is granted, to pilot your ship into the port.

From Santiago you will proceed to Manzanillo, and from thence back to Kingston. The charterer, Mr. Solis, may order you direct from Guantanamo to Kingston or from Santiago to Kingston, and in such a case you will follow out his orders, which he will give you in writing. He has the option of going to the three ports, but it may be convenient for him to go to only one or even two. The boat's crew that is mentioned in the appendix of this agreement you will provide, but it will be necessary for you to have the ensign in the stern, so as to show your nationality.

You will not allow any provisions of any sort to leave your ship at any of the ports or to do anything that is contrary to the laws of the country or that may be interpreted as a breach of faith in being allowed to pass the blockade and enter the ports, and I must ask you not to permit any of your crew to land at any of the ports, and only yourself, if necessary, to visit the British consul.

Wishing you a pleasant voyage, I am, sir,

Yours faithfully,

(S'g'd) W. Peploe Forwood, *Gen. Ag't, Jca.*

Mr. George A. King, Mr. William B. King and *Mr. William E. Harvey* filed a brief for the captors.

MR. JUSTICE BROWN, after stating the case, delivered the opinion of the court.

The rectitude of the decree of the District Court condemning the Adula as prize of war depends upon the existence of a lawful and effective blockade at Guantanamo, the knowledge of such blockade by those in charge of the vessel, and their intent in making the voyage from Kingston.

1. No blockade of Guantanamo was ever proclaimed by the President. A proclamation had been issued June 27, establishing a blockade of all ports on the southern coast of Cuba between Cape Frances on the west and Cape Cruz on the east, but as both Santiago and Guantanamo are to the eastward of Cape Cruz, they were not included. It appears, however, that blockades of Santiago and Guantanamo were established in the early part of June by order of Admiral Sampson, commander of the naval forces then investing the ports on the southern coast of Cuba, and were maintained as actual and effective blockades until after the capture of the Adula.

The legality of a simple or actual blockade as distinguished from a public or Presidential blockade is noticed by writers upon international law, and is said by Halleck to be 'constituted merely by the fact of an investment, and without any necessity of a public notification. As it arises solely from facts it ceases when they terminate; its existence must, therefore, in all cases, be established by clear and decisive evidence.' (Halleck Int. L. chap. 23, sec. 10.) A *de facto* blockade was also recognized as legal by this court in the case of *The Circassian*, 2 Wall. 135, 150, in which the question arose as to the blockade of New Orleans during the civil war. In delivering the opinion of the court, the Chief
p. 367 Justice observed: 'There is | a distinction between simple and public blockades which supports this conclusion. A simple blockade may be established by a naval officer, acting upon his own discretion or under direction of superiors, without governmental notification; while a public blockade is not only established in fact, but is notified, by the government directing it, to other governments. In the case of a simple blockade, the captors are bound to prove its existence at the time of capture; while in the case of a public blockade, the claimants are held to proof of discontinuance in order to protect themselves from the penalties of attempted violation.' A like ruling was made by Sir William Scott in the case of *The Rolla*, 6 C. Rob. 364, which was the case of an American ship and cargo, proceeded against for the breach of a blockade at Montevideo, imposed by the British commander. It was argued, apparently upon the authority of *The Henrick and Maria*, 1 C. Rob. 123, that the power of imposing a blockade is altogether an act of sover-

eignty which cannot be assumed or exercised by a commander without special authority. But, says the learned judge: 'The court then expressed its opinion that this was a position not maintainable to that extent; because a commander going out to a distant station may reasonably be supposed to carry with him such a portion of sovereign authority, delegated to him, as may be necessary to provide for the exigencies of the service upon which he is employed. On stations in Europe, where government is almost at hand to superintend and direct the course of operations, under which it may be expedient that particular hostilities should be carried on, it may be different. But in distant ports of the world it cannot be disputed, I conceive, that a commander must be held to carry with him sufficient authority to act, as well against the commerce of the enemy, as against the enemy himself, for the immediate purpose of reduction.' See also *The Johanna Maria*, Deane on Blockades, 86.

In view of the operations then being carried on for the purpose of destroying or capturing the Spanish fleet and reducing Santiago, we think it was competent for Admiral Sampson to establish a blockade there and at Guantanamo as an adjunct to such operations. Indeed, it would seem to have been | a necessity that restrictions should be placed p. 368
upon the power of neutrals to carry supplies and intelligence to the enemy, as they would be quite sure to do, if their ships were given free ingress and egress from these harbors. While there could be no objections to vessels carrying provisions to the starving insurgents, if their destination could be made certain, the probabilities were that such provisions carried to a beleaguered port, would be immediately seized by the enemy and used for the sustenance of its soldiers. The exigency was one which rendered it entirely prudent for the commander of the fleet to act, without awaiting instructions from Washington.

But it is contended that at the time of the capture, the port of Guantanamo was completely in the possession and control of the United States, and therefore that the blockade had been terminated. It appears, however, that Guantanamo is eighteen miles from the mouth of Guantanamo Bay. Access to it is obtained either by a small river emptying into the upper bay, or by rail from Caimanera, a town on the west side of the upper bay. It seems that the Marblehead and the Yankee were sent to Guantanamo on June 7; entered the harbor and took possession of the lower bay for the use of American vessels; that the Panther and Yosemite were sent there on the 10th, and on the 12th the torpedo boat Porter arrived from Guantanamo with news of a land battle, and from that time the harbor was occupied by naval vessels, and by a party of marines who held the crest of a hill on the west side of the harbor near its entrance, and the side of the hill facing the harbor. But the town of Guantanamo, near the head of the bay, was still held by the Spanish

forces, as were several other positions in the neighborhood. The campaign in the vicinity was in active progress, and encounters between the United States and Spanish troops were of frequent occurrence.

In view of these facts we are of opinion that, as the city of Guantanamo was still held by the Spaniards, and as our troops occupied only the mouth of the bay, the blockade was still operative as against vessels bound for the city of Guantanamo. Here again the case of *The Circassian*, 2 Wall. 135, is decisive. The Circassian was captured May 4,
p. 369 1862, for an attempted | violation of the blockade of New Orleans. The city, including the ports below it on the Mississippi, was captured during the last days of April, and military possession of the city taken on May first. It was held that neither the capture of the forts nor the military occupation of the city terminated the blockade, upon the ground that it applied, not to the city alone, but controlled the port, which included the whole parish of New Orleans, and lay on both sides of the Mississippi, and all the ports on that river and on the lakes east of the city. The following language of the Chief Justice is equally pertinent to this case : ' Now, it may be well enough conceded that a continuous and complete possession of the city and the port, and of the approaches from the Gulf, would make a blockade unnecessary, and would supersede it. But, at the time of the capture of the Circassian, there had been no such possession. Only the city was occupied, not the port, much less the district of country commercially dependent upon it, and blockaded by its blockade. Even the city had been occupied only three days. It was yet hostile ; the rebel army was in the neighborhood ; the occupation, limited and recent, was subject to all the vicissitudes of war. Such an occupation could not at once, of itself, supersede or suspend the blockade. It might ripen into a possession which would have that effect, and it did ; but at the time of the capture it operated only in aid and completion of the naval investment.' The occupation of the city terminates a blockade because, and only because, it supersedes it, and if a vessel be bound to a port or place beyond, which is still occupied by the enemy, the occu pation of the mouth of the harbor does not necessarily terminate the blockade as to such places.

Granting the existence of a lawful and sufficient blockade at Guantanamo, its legal effect was a closing of the port, and an interdiction of the entrance of all vessels of whatever nationality or business. It is well described by Sir William Scott in *The Vrouw Judith*, 1 C. Rob. 126, 128, ' as a sort of circumvallation round a place, by which all foreign connection and correspondence is, as far as human force can effect it, to be entirely cut off. It is intended to suspend the entire commerce
p. 370 of that place, and a neutral is no more at liberty to | assist the traffic of exportation than of importation. The utmost that can be allowed to

a neutral vessel is, that having already taken on board a cargo before the blockade begins, she may be at liberty to retire with it. But it must be considered as a rule which this court means to apply, that a neutral ship departing can only take away a cargo *bona fide* purchased and delivered, before the commencement of the blockade. If she afterwards takes on board a cargo it is a fraudulent act and a violation of the blockade.' It is also said by Phillimore, 3 Int. Law, 383, that 'the object of a blockade is to prevent exports as well as imports, and to cut off all communication of commerce with the blockaded place.' The sailing of a vessel with a premeditated intent to violate a blockade is *ipso facto* a violation of the blockade, and renders the vessel subject to capture from the moment she leaves the port of departure. *Yeaton* v. *Fry*, 5 Cranch, 335; *The Circassian*, 2 Wall. 135; *The Frederick Molke*, 1 C. Rob. 72; *The Columbia*, 1 C. Rob. 130; *The Neptunus*, 2 C. Rob. 110; Wheaton on Captures, 196. If a master have actual notice of a blockade, he is not at liberty even to approach the blockaded port for the purpose of making inquiries of the blockading vessels, since such liberty could not fail to lead to attempts to violate the blockade under pretext of approaching the port for the purpose of making such inquiries. *The Admiral*, 3 Wall. 603; *The Prize cases*, 2 Black, 635, 677; Duer on Ins. 661; *The Cheshire*, 3 Wall. 231; *The James Cook*, Edwards, 261; *The Josephine*, 3 Wall. 83; *The Spes*, 5 C. Rob. 76; *The Betsey*, 1 C. Rob. 280; *The Neptunus*, 2 C. Rob. 110; *The Little William*, 1 Acton, 141, 161; *Sperry* v. *Delaware Ins. Co.*, 2 Wash. C. C. 243. If there be any distinction in this particular between a proclaimed blockade and an actual blockade by a naval commander, it does not aid the Adula in view of the admitted fact that she was informed by the Vixen that the port was under the control of the United States military forces, and that the war ships were visible before she entered the bay.

In this connection we are cited by counsel for the Adula to a change in the law said to have been effected by the adhesion of this Government, at the beginning of the war, to the | declaration of Paris abolishing p. 371
privateering. This supposed change apparently rests upon an extract from a French treatise upon international law by Pistoye and Duverdy, vol. 1, p. 375, in which it is said that by the modern law, in consequence of the declaration of Paris, a vessel must be notified to depart from the blockaded port before she can be captured, and that the contrary rule was the result of the doctrine of the British Orders in Council during the Napoleonic wars, which is now given up by that country. It is also said that 'the old rule was that it was a breach of blockade to enter upon a voyage to the blockaded port. This rule is now changed, because neutrals are obliged only to respect effective blockades. It may well be that a blockade of which official notice has been given is not an effective blockade, or it may be that a blockade which has been estab-

lished by a sufficient force may have ceased to exist. Neutrals then have the right to begin a voyage to a blockaded port in order to see if the blockade still continues. They are only guilty when, while the blockade continues, they actually endeavor to break it.'

We cannot, however, accept this opinion as overruling in any particular the prior decisions of this court in the cases above cited, to the effect that a departure for a blockaded port with intent to violate the blockade renders the vessel liable to seizure. When Congress has spoken upon this subject it will be time enough for this court to act. We cannot change our rulings to conform to the opinions of foreign writers as to what they suppose to be the existing law upon the subject.

We have not overlooked in this connection the provision contained in Art. 18 of Jay's treaty of 1794, to the effect that ' whereas, it frequently happens that vessels sail for a port or place belonging to an enemy, without knowing that the same is either besieged, blockaded or invested, it is agreed, that every vessel so circumstanced, may be turned away from such port or place, but she shall not be detained nor her cargo, if not contraband, confiscated, unless after notice she shall again attempt to enter.' *Fitzsimmons* v. *Newport Ins. Co.*, 4 Cranch, 185. Waiving the question whether this clause of Jay's treaty was abrogated by the
p. 372 war of 1812, and accepting it as a correct | exposition of the law of nations, it applies only to vessels which have sailed for a hostile port or place without knowing that the same is either besieged, blockaded or invested. The whole case against the Adula depends upon the question whether those in charge of her knew before she left Kingston that Santiago and Guantanamo were blockaded. If they did, the treaty does not apply. If they did not, they are entitled to the benefit of this principle of international law. In the case of the *Maryland Ins. Co.* v. *Woods*, 6 Cranch, 29, in which it was held that the vessel could not be placed in the situation of one having notice of the blockade until she was warned off, the decision was placed upon the express ground that orders had been given by the British government, and communicated to our government, ' not to consider blockades as existing, unless in respect to particular ports which may be actually invested, and then not to capture vessels bound to such ports, unless they shall have been previously warned not to enter them.' This order was treated by the court as a mitigation of the general rule so far as respected blockades in the West Indies.

2. The questions concerning the notification of, and the intent to, violate blockade depend largely upon the same testimony, and may be properly disposed of together. There is no doubt that the Adula belonged to a British corporation, the Atlas Steamship Company ; was registered in the name of the managing director of such corporation ; flew the British flag, and prior to the Spanish-American war was engaged in general trade between Kingston and other ports on the coast of Jamaica,

in connection with other steamers of the same line from New York, and from time to time had made voyages to Cuban ports. After the breaking out of the war the steamer was chartered by various persons, in the intervals of its regular work for voyages to Cuba. On May 7, in pursuance of a verbal arrangement between the agent of the steamship company and the American consul, the Adula was sent to Cienfuegos in Cuba to bring away refugees. On arrival off Cienfuegos she was boarded by officers of the U. S. S. Marblehead, who, upon being shown the permit and the ship's papers, allowed her to proceed, though the officers served the master with a | printed copy of the President's proclama- p. 373
tion blockading Cienfuegos and several ports on the north side of Cuba, and made a memorandum on the ship's log that they had done so. She sailed from Cienfuegos May 10, with 350 passengers, mostly women and children ; was again boarded on leaving the port, but was allowed to proceed.

On May 16, she was chartered by a Cuban refugee to proceed to Santiago ; arrived there the following day, and returned with 200 passengers. No war ships were off Santiago at that time. She arrived at Kingston on the 19th, and landed her passengers.

On May 21, she was again chartered to go to Cienfuegos, having a permit from Washington, through the consul, to pass the blockade. She reached the blockading fleet on the 23d, was boarded by a boat from one of the vessels, and was again given permission to proceed ; was arrested upon suspicion by the Spanish authorities in the port of Cienfuegos, but after a detention of sixty hours was released. She sailed again on May 26 directly for Kingston ; saw no war ships in sight, and arrived at Kingston on May 28.

After making two of her ordinary coasting voyages around Jamaica, she was offered a further charter for Cienfuegos, but could not obtain the permission of the American consul, who told the master he had no authority to grant it. She left June 15, with a letter of instructions to the captain to proceed to the fleet off Cienfuegos, then under a public blockade, to ask permission from them to enter the port, and if granted, to go in, and if not granted, to return to Jamaica. She arrived at Cienfuegos June 17 ; landed some provisions which had been shipped for her passengers, found no war ships there, and sailed away on the 19th with only ninety-eight passengers. Sixty miles S.S.E. from Cienfuegos she was stopped by the U. S. S. Yankee, and an officer sent on board. The master showed the boarding officer his instructions and the ship's papers, as well as the passenger list ; was informed that Cienfuegos was blockaded, and that he must not enter it again. She arrived in Kingston on June 21 ; proceeded around the island on her usual coasting trip, and returned to Kingston on the 27th.

She was chartered for her last voyage June 28, by one Solis, | a Spanish p. 374

subject, born near Havana, and living with his family at Manzanillo. He had landed recently from Manzanillo with a cargo of refugees. He had lived in Cuba, and at one time had been the French consul at Manzanillo, though there was no evidence that he had ever coöperated with the Spanish authorities during the war, or rendered aid or comfort to the Spanish forces. He had, however, a passport from the Spanish consul to enter the cities to which he was bound and take passengers away as refugees. He had previously been engaged in shipping supplies to Cuban ports and returning with passengers for Jamaica. He also carried a special personal Spanish passport granted the year before. Such being his political character, he entered into a charter party with the Atlas Steamship Company, under which he was at liberty to go to Manzanillo, Santiago and Guantanamo, and if not permitted to enter these harbors, to return to Kingston. An option was also given to the charterer for another similar voyage upon like terms upon twenty-four hours' notice after arrival at Kingston. The charter was for the conveyance of passengers from Cuban ports to Kingston at one hundred pounds per day. Solis was entered upon the ship's articles as supercargo. She was evidently chartered for his personal benefit, with power to name the port which she was to visit, but with no right to interfere with the navigation of the ship. Solis had made the same sort of trip twice before with English schooners, and expected upon this trip to make $19,000 net profit. He appeared to have known nothing about the previous voyages of the Adula, and had seen her for the first time only about two months before. The vessel bore a passport from the Spanish consul at Kingston; a bill of health *viséd* by the Spanish consul. With regard to his knowledge of the blockade at Guantanamo he testified as follows:

'I knew that there was a condition of war existing between America and Spain on the 21st. They told me on board the Adula that the blockade of Guantanamo was published on the 27th, the day before. I had not heard it before I left Kingston. I did not know officially Guantanamo was blockaded. On board the Adula I heard that on the
p. 375 27th there was issued | an order from the President of the United States declaring a blockade of the port of Guantanamo, but I did not know it until we arrived at Guantanamo. At Kingston I heard there were some war ships at Guantanamo, and I told Captain Forwood that the first thing I would do would be to go to the admiral and tell him my intentions. I did not think the papers in Kingston published the blockade. I did not see it if they did. The people generally did not talk about it. I read something about "McCalla's camp." I understood Guantanamo was not blockaded by the United States. I heard that marines had been landed at the entrance to Guantanamo, Caimenera—the bay is called Caimenera—and that the marines had possession of the port, and that the ships were inside. I cannot tell when I received the informa-

tion that marines had been landed there and taken possession of the point of Guantanamo or Caimenera. Perhaps it was one or two days before. I don't know what the others knew about a state of war existing. I understood Guantanamo was not declared officially blockaded, although there were some vessels there. I got that information from newspapers in Kingston, and from those newspapers I got the information that marines had been landed at the entrance to the bay on the east side; they call it " East Point." '

It further appeared that the American consul warned Mr. Forwood, the agent of the ship at Kingston, of the existence of the blockade in the following language, as stated by the agent himself: ' " Well, Forwood, I would not advise you to let the ship go; they won't let her into Guantanamo, and they will be watching for her." I said to him, " Oh, Dent, let me show you the captain's instructions. He has got orders to go to the fleet there and ask their permission to take some refugees." " Well," he said, " I don't know, but they will be watching for her, and I think that Senor Solis is a Spanish agent, carrying $300,000 in gold to buy over the rebels in the American camp." I told him that I had inquired about the man, and that it was one of the usual Kingston yarns.' It also appears that Mr. Forwood knew that Mr. Solis was a Spaniard, and had been shipping supplies to Cuban ports. After taking on board a large supply | of coal, the Adula left Kingston on June 28; rounded p. 376
Morant Point on the east end of the island of Jamaica; proceeded at her usual speed toward Santiago, and sighted the blockading fleet off that port about noon of the 29th. The captain gives as his reason for going by the way of Santiago that he was not acquainted with the coast line to the eastward of that port; had no large scale chart, and therefore steered more to the westward than he should have done, because he knew the coast about Santiago, and did not know that about Guantanamo; but it is quite as probable that it was the presence of a number of war vessels off Santiago which sent her to Guantanamo. She was hailed by the Vixen within half a mile of the entrance to the harbor of Guantanamo, brought to, and then directed into the harbor, where several war vessels were lying, and was shortly thereafter seized by order of Commander McCalla of the Marblehead.

In his testimony before the prize commissioners, Captain Yeates, master of the Adula, stated that he was stopped by the Vixen about a half a mile from the entrance to the bay and permitted to proceed, and that it was not until after he had anchored that he was acquainted with the blockade of the harbor. One of the crew testified somewhat to the contrary and swore that ' about three days before I left Kingston I heard that Guantanamo was blockaded; I heard it from people around the streets; I did not see it; I heard it was in the papers; I never heard any of the officers of the Adula or people on board talking about Guanta-

namo being blockaded, and I don't know exactly whether the owner or master or officers of the ship Adula knew that Guantanamo was blockaded. I knew about it, but I don't know anything about them. I don't know how I found it out, but I heard it on the streets of Kingston.' He also swore ' that at that time he went up to the mouth of the harbor, and at that time, when we got to Guantanamo, we found the war ships there blockading the harbor.' A small cruiser, the Vixen, ' ran up across our bow and the captain of the cruiser asked us : " Didn't you sight the war ships down at Santiago ? " and the captain said, " Yes." And the captain stopped, and he said : " Didn't you hear that Guantanamo was |
p. 377 blockaded ? " and our captain said " Yes." Then he said, " You can proceed on." I heard about the blockade in Kingston, but after leaving Kingston, until we met the cruiser, I never heard anything more about it.' Captain Yeates also testified that he expected to be stopped when he approached Santiago. Mr. Solis, who had chartered the Adula for this voyage, testified that he was told, while on board the Adula, that the blockade of Guantanamo was published on the 27th, the day before, but that he had not heard of it before he left Kingston, though he had heard, while in Kingston, that there were some war ships at Guantanamo. At the time the Adula was captured she was searched for her ship's papers and other documents and letters. Several letters were found, as well as copies of a newspaper published at Kingston, which spoke of the American military and naval operations both at Santiago and Guantanamo.

Among these extracts from The Gleaner of July 14, 1898, is the following, apparently telegraphed from London : ' A dispatch boat off Santiago reports that the Americans now hold thirty-five miles of the coast east of Santiago, including Guantanamo harbor, and that 20,000 Spanish troops at Santiago are preparing to desperately resist the Americans, who have landed 3000 rifles, 300,000 rounds of ammunition, and large stores of provisions ; ' and the following from the issue of June 25 : ' On board the Adula, which arrived from Cienfuegos this week, there was an individual officially appointed by the Captain General in Cuba to make arrangements in Jamaica for regularly supplying the Spanish troops with provisions ; in fact, to make Jamaica a base for Spanish purposes.'

In this connection it would seem from the report of the Bureau of Navigation that the consul at Kingston telegraphed to Washington that the Under Secretary of the Captain General of Cuba and certain Spanish naval officers ' came aboard the Adula with, it is supposed, $250,000 to purchase provisions to be taken to Manzanillo for Cervera. . . . Extensive preparations being made for shipping provisions to Cuba.'

In a letter from Captain Yeates to his parents, under date of July 13, and apparently written while the Adula was at Savannah, he says :

'And now to tell you dear ones how it is | or was that we got into this p. 378
pickle, which has not come as any surprise, as I have anticipated this for some time; it is I did not think I should be in command when it happened, but it was my luck to be, I suppose.' Speaking of the capture, he says: 'They turned the ship upside down; took my papers; measured the coals, and took stock generally. As far as the ship is concerned she was on perfectly legitimate business, fetching refugees. Whether Mr. Solis chartered the ship for that purpose alone, of course, has to be proved, and we are now on our way to Savannah for that purpose with a prize crew and Lieutenant Anderson in charge.' In a postscript dated at Savannah, July 15, he says: 'We have not yet reached the town proper, for we are going through the same performance as we did at Tampa, but I was not caught this time, for I managed to keep my things out of the oven.'

As tending to show the good faith of this expedition, and more particularly the owners of the Adula, much reliance is placed upon the letter of Mr. Forwood to Captain Yeates of June 28, the day upon which the Adula left Kingston, in which he instructs him, in case he finds American war ships off Guantanamo, to stop immediately upon being signalled, and communicate to the commanding officer the object of the voyage, and to be careful upon his arrival 'not to interfere, or in any way make any observations or sketches of anything you may see or hear of, but adhere strictly to the duties of your ship,' and observe the same precautions off Santiago. In this letter he also instructs him not to allow any provisions to leave the ship, or to do anything which could be interpreted as a breach of faith in being allowed to pass the blockade and enter the ports. While this letter doubtless tends to show good faith on the part of Mr. Forwood, still it was written with full information from Mr. Solis that the consul had refused to give him a passport, without permission from the American authorities in Washington. That Mr. Forwood recognized the necessity of an authority from Washington in order to pass the blockade is shown by his letter to Captain Walker of May 21, 1898, in reference to one of the voyages to Cienfuegos, in which he says: 'In giving this letter to the blockade, be sure and ask | the officer p. 379
if he would allow the ship to pass another voyage without cabling to Washington.'

From all the testimony in the case it appears very clear:

That Guantanamo was actually and effectively blockaded by orders of Admiral Sampson from June 7 until after the capture of the Adula;

That the Adula was chartered to a Spanish subject for a voyage to Guantanamo, Santiago or Manzanillo, for the purpose of bringing away refugees, and that such voyage was primarily, at least, a commercial one for the personal profit of the charterer. During such charter she was to a certain extent, *pro hac vice*, a Spanish vessel, and a notice to

Solis of the existence of the blockade was a notice to the vessel. *The Ranger*, 6 C. Rob. 126 ; *The Jonge Emilia*, 3 C. Rob. 52 ; *The Napoleon*, Blatch. Prize Cases, 296. The fact of her sailing under a Spanish passport—in fact, an enemy's license—is not devoid of significance. Indeed, we have in several cases regarded this as sufficient ground for condemnation. *The Julia*, 8 Cranch, 181 ; *The Aurora*, 8 Cranch, 203 ; *The Hiram*, 1 Wheat. 440 ; *The Ariadne*, 2 Wheat. 143. This passport gave the Adula authority to enter the Cuban ports and take away refugees, and it is a circumstance worthy of notice that it could not be found when the vessel was captured. Solis acknowledged its existence, but made no effort to account for its loss ;

Both Solis himself and the Adula had been previously engaged in similar enterprises to the coast of Cuba, and were chargeable with notice, not only of war between the United States and Spain, but with the fact of military and naval operations upon the southern coast of Cuba ;

The fact of such war, that the object of it was the expulsion of the Spanish forces from Cuba, and that military and naval operations were being carried on by us with that object in view, must have been matters of common knowledge in Kingston, as well as the fact that the commerce with the southern ports of Cuba was likely to be interrupted, and that all intercourse with such ports would become dangerous in consequence of such war ;

p. 380 While the mission of the Adula was not an unfriendly one | to this Government, she was not a cartel ship, privileged from capture as such, but one employed in a commercial enterprise for the personal profit of the charterer, and only secondarily, if at all, for the purpose of humanity. Her enterprise was an unlawful one, in case a blockade existed, and both Solis and the master of the Adula were cognizant of this fact. The direction of the commanding officer of the Vixen, which overhauled the Adula off Guantanamo, to enter the harbor, cannot be construed as a permission to violate the blockade, as such permission would not be within the scope of his authority. *The Hope*, 1 Dod. 226 ; *The Amado*, Newb. 400 ; *The Joseph*, 8 Cr. 451 ; *The Benito Estenger*, *post.*

That upon arrival off Santiago the blockading fleet was plainly visible, and we think there is a preponderance of evidence to the effect that both Solis and the master of the Adula knew of the actual blockade, that it was generally known in Kingston before she sailed, and that the Adula was chargeable with a breach of it, notwithstanding the letter of instructions from Mr. Forwood to Captain Yeates. As the blockade had been in existence since June 7, it is scarcely possible that, in the three weeks that elapsed before the Adula sailed, it should not have been known in Kingston, which was only a day's trip from the southern coast of Cuba, and with which it appears to have been in frequent communication. This probability is confirmed by the direct testimony of the sailor Morris,

that it was matter of common talk in Kingston. The testimony of Solis, that he did not know 'officially' that Guantanamo was blockaded, by which we are to understand that it had not been officially proclaimed, is perfectly consistent with a personal knowledge of the actual fact. His statement seems to be little more than a convenient evasion. Upon the principle already stated his knowledge was the knowledge of the ship.

We think the facts herein stated outweigh the general statement of the officers that they had not heard of the blockade.

3. There was no error in denying the motion of the claimant to take further proofs. It appears from the opinion of the court that 'the hearing upon the proceedings for condemnation was upon the evidence afforded by the examination of the | captured crew taken upon standing interro- p. 381
gatories, the ship's papers and other evidence of a documentary character found upon the ship by the captors. This was done in conformity to the established rule in prize causes.'

The motion to take further proof was made upon the affidavit of Robert Gemmell, the New York agent of the company, the statement of W. P. Forwood, the Kingston agent, annexed thereto, as well as his own affidavit and exhibits, and upon the counter testimony of Anderson, Ellenberg and Gill taken *de bene esse*. Upon the hearing of this motion the court considered the allegations of Forwood, attached to Gemmell's affidavit, as if Forwood had testified upon depositions regularly taken, giving due weight to the same in connection with other evidence in the case; and was of opinion that the evidence as it stood was not susceptible of any satisfactory explanation; and comparing the proof proposed to be brought forward with that already in the case, came to the conclusion that the legal effect of the facts before the court could not be varied by the explanation offered. The motion was denied. In considering this case we have also given effect to these affidavits, and have come to the conclusion that, if they are to be taken as true, and the further proofs, if taken, would support them, they would not change our opinion with respect to the affirmance of the decree.

If an examination of the ship's papers and of the crew, taken *in preparatorio*, upon which the cause is first heard in the District Court, make a case for condemnation, the order for further proof is, as stated in *The Gray Jacket*, 5 Wall. 342, 368, always made with extreme caution, and only where the interests of justice clearly require it. If the ship's papers and the testimony of the crew do not justify an acquittal, it is improbable that a defence would be established by further proof; and as the interest of all parties require that prize causes be quickly disposed of, it is only where the testimony *in preparatorio* makes a case of grave doubt, that the court orders the taking of further proofs. *The Pizarro*, 2 Wheat. 227; *The Amiable Isabella*, 6 Wheat. 1, 77; Benedict's Adm'y, sec. 512 *a*; Story on Prize Courts, 17. |

p. 382 It was said by Sir William Scott in *The Sarah*, 3 C. Rob. 330, that ' it has seldom been done except in cases where there has appeared something in the original evidence, which lays a suggestion for prosecuting the inquiry farther. In such case the court has allowed it ; but when the matter is foreign, and not connected with the original evidence of the cause, it must be under very peculiar circumstances indeed that the court will be induced to accede to such an application ; because, if remote suggestions were allowed, the practice of the court would be led away from the simplicity of prize proceedings, and there would be no end to the accumulation of proof that would be introduced in order to support arbitrary suggestions.'

These remarks are specially pertinent to the offer of further proof that, while Solis owed allegiance to the Queen of Spain, yet, that he left Cuba soon after the war broke out, took no part in the hostilities, but on the contrary had done all in his power while he remained in Cuba to assist citizens of the United States residing there ; had sided with the natives of Cuba, and was desirous that a government should be established in the island under the auspices of the United States. As was observed in the very satisfactory opinion of the District Judge in this case, this evidence was altogether irrelevant to the case of the Adula, and was, to a certain extent, a contradiction of his testimony before the prize commissioners that he was a loyal subject of Spain, bore a Spanish passport, and carried a bill of health *viséd* by the Spanish consul at Kingston. It would throw the whole practice in prize cases into confusion if the testimony, taken *in preparatorio*, when the facts are fresh in the minds of the witnesses, were subject to be contradicted by the same witnesses after its weak points had been developed. It was said by Mr. Justice Story in *The Pizarro*, 2 Wheat. 227 : ' Nor should the captured crew have been permitted to be reëxamined in court. They are bound to declare the whole truth upon the first examination ; and if they fraudulently suppress any material facts, they ought not to be indulged with an opportunity to disclose what they please, or to give color to their former statements after counsel has been taken, and they
p. 383 know the pressure of the cause. Public policy and justice | equally point out the necessity of an inflexible adherence to this rule.'

Upon the whole, we think the decree of the District Court was correct, and it is therefore

Affirmed.

Mr. Justice Shiras, with whom concurred Mr. Justice Gray, Mr. Justice White and Mr. Justice Peckham, dissenting.

I cannot concur in the judgment of the court in this case, and shall state my views briefly, without entering at length upon a discussion in support of them.

By a joint resolution of the Senate and House of Representatives

of the United States, approved April 20, 1898, it was declared ' That the people of the Island of Cuba are, and of right ought to be, free and independent.' ' That it is the duty of the United States to demand, and the Government of the United States does hereby demand, that the Government of Spain at once relinquish its authority and government in the Island of Cuba, and withdraw its land and naval forces from Cuba and Cuban waters.' ' That the President of the United States be, and he hereby is, directed and empowered to use the entire land and naval forces of the United States, and to call into the actual service of the United States the militia of the several States to such extent as may be necessary to carry these resolutions into effect.' ' That the United States hereby disclaims any disposition or intention to exercise sovereignty, jurisdiction or control over said island except for the pacification thereof, and asserts its determination, when that is accomplished, to leave the government and control of the island to its people.' 30 Stat. 738.

By an act approved April 25, 1898, Congress declared ' That war be, and the same is hereby, declared to exist, and that war has existed since the twenty-first day of April, A.D. 1898, including said day, between the United States of America and the Kingdom of Spain.' 30 Stat. 364, c. 189.

On April 22, a blockade of the north coast of Cuba between Cardenas and Bahia Honda, and of Cienfuegos on the south | coast, was declared p. 384
by the President, and on June 27 the President by proclamation gave notice that the Cuban blockade had been extended to include all the ports on the southern coast between Cape Frances and Cape Cruz. Neither of these proclamations included the port of Guantanamo, nor was any blockade of that port ever proclaimed by the President.

The Adula was a British vessel, and on June 28 she left the British port of Kingston, in the Island of Jamaica, bound, according to the instructions from the agent of the Atlas Steamship Company, the owners, to Captain Yeates, the master of the vessel, directly to the port of Guantanamo. Among the instructions, found on the vessel when she was captured, were the following :

' I enclose herein a copy of the agreement under which your vessel is proceeding on, and on board the ship will be the charterer, to whom I now introduce you, Mr. José R. Solis, and I will ask you to show him every attention on the voyage.

' You will see by a perusal of the agreement that you are on a voyage wholly and solely for the conveyance of refugees from the ports named to Kingston.

' On your arrival at Guantanamo, to which port you will proceed direct, you will find, no doubt, American war ships off the port. You will, when signalled to, stop immediately and communicate to the commanding officer the voyage that you are on, and in fact you can show him these sailing orders, and I do not think that the commanding officer will

make any trouble whatever to your continuing the voyage into the port. You must be careful on your arrival there not to interfere or in any way make any observations or sketches of anything you may see or hear of, but adhere strictly to the duties of your ship. At Guantanamo it is likely there may be some difficulty in obtaining a pilot, and if the commanding officer gives you permission to proceed it is just possible that he may be able to tell you where you can obtain the services of a pilot to go in.'

On the afternoon of the 29th June the Adula approached the harbor of Guantanamo, and there met the United States war vessel Vixen.
p. 385 It was testified by Captain Yeates before | the prize commission as follows: 'We passed one vessel. I think it was the Vixen. He fired a gun. I stopped immediately, and he told me to proceed. He did not stop his engines at all; just steamed right on by. Captain Forwood told me I should see vessels of war around there. When the Vixen hailed me we were about half a mile from the entrance of the bay, and about four miles from where we anchored.' This evidence was not contradicted, and, in respect to the permission to proceed, was corroborated by one of the crew of the Adula.

After the vessel had entered and anchored in the bay she was seized by the Marblehead, a war ship of the United States, which was lying inside the bay, and was sent to Savannah, where, on July 28, a decree of condemnation was entered against her. No goods of a contraband character were on the vessel.

Upon these admitted facts, there was no duly constituted blockade of Guantanamo existing when the Adula sailed for and entered that port.

On the contrary, by the successive Presidential proclamations of blockade, that port was left free and open for the entrance of neutral vessels. Indeed, it may be fairly said that, in the special circumstances of our war with Spain, those proclamations were intended to permit, if not to invite, the continuance of commerce in goods, not contraband, in all the Cuban ports not included within the limits defined. The United States were not carrying on warlike operations against the people of Cuba. They were declared, by the joint resolution of the two houses of Congress, to be free and independent, and the Government of Spain was called upon to relinquish its government, and to withdraw its land and naval forces from Cuba and Cuban waters. It was notorious that great misery and destitution had been caused among the inhabitants by the military operations of the Spanish army in a long and fruitless effort to subdue the revolutionary movement. Indeed, that condition of the people of Cuba was one of the principal inducements to the United States to intervene on their behalf.

p. 386 It may be well here to refer to the message of the President | to

Congress, of the date of April 11, 1898, wherein will be found the following statements :

' Our people have beheld a once prosperous community reduced to comparative want, its lucrative commerce virtually paralyzed, its fields laid waste, its mills in ruins, and its people perishing by tens of thousands from hunger and destitution. . . . The policy of devastation and concentration, inaugurated by the Captain General's bando of October 21, 1896, in the province of Pinar del Rio, was thence extended to embrace all of the island to which the power of the Spanish arms was able to reach by occupation or by military operations. The peasantry, including all dwelling in the open agricultural interior, were driven into the garrison towns or isolated places held by the troops.'

And, after reciting the fact that he had made an appeal to the American people to furnish succor to the starving sufferers in Cuba, the President concluded :

' In view of these facts and of these considerations I ask the Congress to authorize and empower the President to take measures to secure a full and final termination of hostilities between the Government of Spain and the people of Cuba, and to secure in the island the establishment of a stable government, capable of maintaining order and observing its international obligations, insuring peace and tranquillity and the security of its citizens as well as of our own, and to use the military and naval forces of the United States as may be necessary for these purposes. And in the interest of humanity and to aid in preserving the lives of the starving people of the island, I recommend that the distribution of food and supplies be continued, and that an appropriation be made out of the public treasury to supplement the charity of our citizens.'

The policy of our Government, in respect to the rights of neutrals, was further made to appear in the President's proclamation of April 26, 1898, declaring our adhesion to the rules of the Declaration of Paris, whereby important modifications, in recognition of the rights of neutrals and of principles of humanity, were introduced into international law.

What was more natural, then, than that our Government | would p. 387
approve all efforts to furnish food to those famishing people, and to aid them in escaping from the seat of war ? It appears that the Adula, after the declaration of war, had made several voyages to Cuban ports, with the express permission of the American consul at Kingston ; had brought away several hundred refugees, chiefly women and children, and was engaged in a similar errand when seized.

It is, however, claimed that an actual blockade of Guantanamo had been established by Admiral Sampson early in June, which was in existence at the time the Adula entered that port, and that her master had knowledge of such blockade before leaving Kingston.

To declare a blockade effective against neutrals not carrying contraband goods is said by all the authorities to be one of the highest acts of sovereignty, not to be resorted to except for reasons based on well-known principles of modern warfare, and to be proclaimed so as to give full notice to friendly and neutral nations.

As was said by this court, through Mr. Justice Grier, in *Prize Cases*, 2 Black, 635, 665 : ' Neutrals have a right to challenge the existence of a blockade *de facto*, and also the authority of the party exercising the right to institute it. They have a right to enter the ports of a friendly nation for the purposes of trade and commerce, but are bound to recognize the rights of a belligerent, engaged in actual war, to use this method of coercion, for the purpose of subduing the enemy. . . . That the President, as the executive chief of the Government and commander-in-chief of the Army and Navy, was the proper person to make such notification, has not been and cannot be disputed.'

So it was held by Sir William Scott, in *The Henrick and Maria*, 1 Rob. 123, 125, that ' notification of a blockade is an act of high sovereignty, and not to be extended by those employed to carry it into execution. . . . A declaration of blockade is a high act of sovereignty; and a commander of a King's ship is not to extend it.'

' Where a blockade has been declared by the Government, the
p. 388 commander of the blockading squadron has no discretionary | power to extend its limits. If he prohibits neutral ships from entering ports not embraced in the terms of the blockade he was appointed to enforce, the warning is illegal, and no penalty is incurred by the neutral master by whom it is disregarded.' 1 Duer Ins. 647, sec. 23.

' A declaration of blockade is a high act of sovereignty, and it is usually made directly by the government to which the blockading squadron belongs. A blockade is however in some cases declared by an officer of a belligerent power, and when so declared it will affect the subjects of neutral nations as far as it is authorized, or adopted and ratified, by his government. The implied authority in this respect vested in a naval commander is much greater at a distance from his government than when he is near it. To affect neutral nations, it must be laid by competent authority, and they are affected only in the extent to which it is so laid.' 1 Phillips on Insurance, 466.

As it does not appear that the Government delegated any authority to Admiral Sampson to declare a blockade of the port of Guantanamo, but declared a limited and specified blockade of portions of the Cuban coast by Presidential proclamation, leaving the port in question free and open to neutral commerce, in goods not contraband, it follows that for Admiral Sampson to declare a blockade of such port would have been, on his part, an effort to defeat the policy of his Government, which, as we have seen, was shown, by the proclamations and messages of the Presi-

dent, to have intended to leave open a large portion of the Cuban coast, and ports included therein, to neutral and friendly commerce, designed to furnish food to our starving allies, and to enable their women and children to flee from the oppression under which they were suffering.

Moreover, it does not appear that Admiral Sampson claimed or exercised any right to declare a blockade of Guantanamo. Doubtless he occupied that bay and its adjacent waters with his war vessels, and that gave him a right to visit and search even neutral vessels, to discover whether they carried contraband goods. But this did not warrant any vessel of his | squadron to seize a neutral ship, not carrying contraband p. 389
goods, when entering a port in effect left free by the proclamation of the President.

But, even if it were conceded that the American commander could establish, without proclamation, a valid actual blockade of the port in question, it would still be true, in my opinion, that the seizure of the Adula was contrary to well-established principles of international law.

When a blockade of a given coast or port of one belligerent has been declared by the sovereign power of another, all vessels of neutral or friendly nations are thereby supposed to be visited with notice of such blockade, and it has been held that if they sailed for the blockaded port, with the intent to enter it, and approach it for that purpose, they are subject to seizure and condemnation, and that they cannot even approach the blockaded port for the purpose of making inquiries of the blockading vessels, since such liberty might lead to attempts to violate the blockade under pretext of approaching for the purpose of making such inquiries. *The Cheshire*, 3 Wall. 231.

But, in the case of a blockade established by a naval officer, acting upon his own discretion, without governmental proclamation, neutrals are not visited with implied notice of the existence of such a blockade, and they may rightfully sail for such a blockaded port, and if, when approaching it, armed vessels are seen to be in its immediate neighborhood, they may apply to such vessels for information and for leave to enter, without subjecting themselves to capture. The duty of the blockading squadron, if objection exists to permitting neutral vessels to enter, is to warn them off. If, after such warning, the neutral vessels, disregarding it, attempt to enter, they are liable to seizure.

As was said in the case of *The Circassian*, 2 Wall. 135, 150, which was a case where the blockade had been proclaimed by the American government : ' There is a distinction between simple and public blockades which supports this conclusion. A simple blockade may be established by a naval officer, acting upon his own discretion, or under direction of superiors, without governmental notification ; while a public blockade is | not only established in fact, but is notified, by the government directing p 390.
it, to other governments. In the case of a simple blockade the captors

are bound to prove its existence at the time of capture; while, in the case of a public blockade, the claimants are held to proof of discontinuance in order to protect themselves from the penalties of attempted violation. The blockade of the rebel ports was and is of the latter character. It was legally established and regularly notified by the American government to the neutral governments. Of such a blockade, it was well observed by Sir William Scott: 'It must be conceived to exist till the revocation of it is actually notified.' The blockade of the rebel ports, therefore, must be presumed to have continued until notification of discontinuance.'

In *Fitzsimmons* v. *Newport Ins. Co.*, 4 Cranch, 185, 198, it was held that the fact of clearing out for a blockaded port is, in itself, innocent, unless accompanied by other incidents; that the offence consists in persisting in attempting to enter the interdicted port after having been warned; and it was said by Chief Justice Marshall:

'The right to treat the vessel as an enemy is declared by Vattel to be founded on the attempt to enter, and certainly this attempt must be made by a person knowing the fact. But this subject has been precisely regulated by the treaty between the United States and Great Britain, which was in force when this condemnation took place. That treaty contains the following clause:

'"And whereas it frequently happens that vessels sail for a port or place belonging to an enemy, without knowing that the same is either besieged, blockaded or invested, it is agreed that every vessel so circumstanced may be turned away from such port or place, but she shall not be detained, nor her cargo, if not contraband, be confiscated, unless, after notice, she shall again attempt to enter; but she shall be permitted to go to any other port or place she may think proper."

'This treaty is conceived to be a correct exposition of the law of nations; certainly it is admitted by the parties to it, as between themp. 391 selves, to be a correct exposition of that law, or | to constitute a rule in the place of it. Neither the law of nations nor the treaty admits of the condemnation of the neutral vessel for the intention to enter a blockaded port, unconnected with any fact.'

The distinction between a blockade declared by a government and a blockade *de facto* is thus stated by Chancellor Kent:

'A notice to a foreign government is a notice to all the individuals of that nation; and they are not permitted to aver ignorance of it, because it is the duty of the neutral government to communicate the notice to their people.

'In the case of a blockade without regular notice, notice in fact is generally requisite; and there is this difference between a blockade regularly notified, and one without such notice, that, in the former case, the act of sailing for the blockaded port, with the intent to evade it, or to enter it contingently, amounts, from the very commencement of the

voyage, to a breach of the blockade ; for the port is to be considered as closed up, until the blockade be formally revoked, or actually raised ; whereas, in the latter case of a blockade *de facto*, the ignorance of the party as to its continuance may be received as an excuse for sailing to the blockaded place, on a doubtful and provisional destination.'

It should be noted that the American cases cited, on behalf of the captors, to the effect that sailing from a neutral port to a blockaded port is, in itself, a violation of the blockade, were cases in which there had been a Presidential proclamation, of which neutral vessels were bound to take notice. *The Circassian*, 2 Wall. 135 ; *The Admiral*, 3 Wall. 603.

It should further be considered that in the President's proclamation of April 22, 1898, establishing the extent of the blockade, there was contained the following provision :

' Any neutral vessel approaching any of said ports, or attempting to leave the same, without notice or knowledge of the establishment of such blockade, will be duly warned by the commander of the blockading forces, who will indorse on her register the fact, and the date, of such warning where such instrument was made ; and if the same vessel shall again | attempt to enter any blockaded port she will be captured and sent p. 392
to the nearest convenient port for such proceedings against her and her cargo as prize, as may be deemed advisable.' 30 Stat. 1769.

Of course, if the blockade of Guantanamo was illegal, as inconsistent with the terms and intent of the President's proclamations, no consideration of the evidence regarding the movements of the vessel is called for, and it is a clear case for restitution. In such a case, no importance can be ascribed to any supposed notice to the owners of the ship. The Admiral's want of power to override the policy and intentions of the Government cannot be supplied by imputing to the vessel a knowledge of an actual occupation of the port by armed vessels of the United States. Such occupation would be no reason why neutral ships, not carrying contraband cargo, might not fearlessly approach and enter the harbor.

If, however, the other view be taken, namely, that it was competent for the Admiral, of his own motion, to establish a blockade, still, as we have seen, neutral vessels were entitled, on principle and authority, to a warning by the blockading squadron, and could only become lawful prize by disregarding the warning, and renewing the attempt to enter. Mere knowledge by the neutral vessel that vessels of war occupied the harbor and adjacent waters would not constitute notice or knowledge of a blockade ; she would be entitled to an actual warning. *Maryland Ins. Co.* v. *Woods*, 6 Cranch, 29.

The Adula received no such warning. When she approached the harbor she was hailed by a war vessel, the Vixen, and was told to proceed. If, by telling the Adula to proceed, the commander of the Vixen is to be

understood as taking charge of the Adula as engaged in an attempt to break the blockade, there was, of course, no warning. If, what seems the natural import of the language, the commander of the Vixen gave the neutral vessel permission to enter the harbor, not only was there no warning, but such permission protected her from the subsequent seizure after she had entered and anchored in the harbor.

p. 393 But it is contended that the Adula had actual knowledge of the existence of the blockade when she sailed from Kingston, and that such knowledge deprived her of the right to a warning.

As already said, if the blockade had been regularly proclaimed by the United States government, the Adula, as a neutral vessel, if aware of the blockade, could not lawfully have sailed from Kingston and approached Guantanamo with an intention to enter it unless intercepted. It is well settled that, in the case of a proclaimed blockade, the neutral vessel may not, with a knowledge of the proclamation, approach the prohibited port, even for the purpose of inquiring from the vessels in occupation whether the blockade was still in existence. The reason given for such a decision is that it would seriously affect the efficiency of the blockade if ships were permitted to approach the blockaded port on pretext of inquiry, and thus be enabled to slip in if there was a momentary absence of a blockading vessel.

But different principles prevail in the case of a blockade *de facto*. Then, neutral vessels may, even with knowledge that such a blockade had been in existence, sail for such port with a clear right to inquire whether the blockade was still in force, and to enter the port if it is found not to be actually blockaded. The reason for the distinction, given in the authorities, is that a proclaimed blockade is deemed to continue until the blockade is raised by a declaration of the power that established it. But a simple or *de facto* blockade lasts only so long as the blockading squadron chooses to maintain it by a present and actual force. The reasons for constituting such a blockade may cease at any time, and a neutral vessel, on a peaceful voyage, and not carrying a contraband cargo, may lawfully sail for such a port, and, if when she reaches it the blockade continues, is entitled to a warning.

Thus far it has been assumed that the Adula had actual knowledge of the blockade when she sailed from Kingston, and it has been shown that, in the case of a blockade of the character that this one is claimed to have been, namely, one created by and depending on the will of the

p. 394 commander of | the fleet, the neutral was entitled to a warning, whether she had or not previous information that a blockade had existed some time before.

But, in point of fact, as I read the evidence, the Adula had not such previous knowledge, but approached Guantanamo Bay, within the terms

of the President's proclamation, without notice or knowledge of the establishment of a blockade, and was therefore entitled to be 'duly warned by the commander of the blockading forces.'

Captain Yeates, Purser Williamson and Solis testified in direct terms that they had no knowledge or information before sailing that Guantanamo was blockaded. The only testimony to the contrary was that of Morris, a colored seaman, who said that about three days before he left Kingston he heard that Guantanamo was blockaded. He does not give the source of his information, or pretend that he made known the matter to the owners or to the officers of the vessel. Probably all he meant was that he had heard that the United States fleet was at Guantanamo. The other facts plainly corroborate the captain's testimony. Consider the direction contained in the instructions given the captain, and shown in the record: 'On your arrival at Guantanamo, to which port you will proceed direct, you will find, no doubt, American war ships off the port. You will, when signalled to, immediately stop and communicate to the commanding officer the voyage you are on, and, in fact, you can show him these sailing orders, and I do not think that the commanding officer will make any trouble whatever to your continuing the voyage into the port.... At Guantanamo it is likely there may be some difficulty in obtaining a pilot, and if the commanding officer gives you permission to proceed it is just possible that he may be able to tell you where you can obtain the services of a pilot to go in.' Such instructions are not consistent with knowledge, on the part of the general agent who gave them, that a blockade was actually in force, nor with any intention to violate it.

So, too, the conversation that Solis, the charterer, had with the United States consul at Kingston, in which he sought to | obtain a passport for the p. 395
voyage, and in which he informed the consul of the object of the voyage, and of his intention to ask permission of the American Admiral to enter the port, shows that no clandestine or improper voyage was intended. A person designing to violate a blockade assuredly would not inform the consul of the nation whose vessels were maintaining the blockade of the time and circumstances of his voyage.

Solis further testified that he first heard of the blockade on the Adula on June 28; that he then heard that on the 27th there was issued an order of the President of the United States declaring a blockade, etc. But as it is not pretended that the President had issued any such proclamation, it is evident that Solis was speaking of a mere rumor; and he immediately added: 'I understood Guantanamo was not declared officially blockaded, although there were some vessels there. I got that information from newspapers in Kingston and from those newspapers I got the information that marines had been landed at the entrance to the bay on the east side.'

It is stated, in the opinion of the majority, that the American consul

warned Mr. Forwood, the agent of the ship at Kingston, of the existence of the blockade. This statement is based on Forwood's recital of what passed between the consul and himself, in the following language: 'Well, Forwood, I would not advise you to let the ship go. They won't let her into Guantanamo, and they will be watching for her.' So far from this language importing a notification of an existing blockade, it rather implies the contrary—that the voyage would be fruitless because the consul believed that the ship would not be allowed to enter the destined port. It certainly cannot be regarded as an official notice of an existing blockade, as is claimed in the argument for the captors. The consul was right, in the existing circumstances, in declining to give the permit desired; but he had no power to declare a port to be in blockade, nor did he pretend to do so.

So far, therefore, as respects the matters urged as evidence, that the Adula, her owners, master, or charterer knew, or had any good reason to
p: 396 believe, that, at the time she sailed, there | was an existing blockade of the port of Guantanamo, they seem to me to be 'trifles light as air.'

What this court said, through Mr. Justice Grier, in the *Prize Cases*, 2 Black, 635, may well be repeated here:

'All reasonable doubts shall be resolved in favor of the claimants. Any other course would be inconsistent with the high administration of the law, and the character of a just government.'

Some make-weights are attempted to be thrown into the scales by adverting to the fact that Solis had passports from the Spanish consul, and the following cases are cited in the majority opinion: *The Julia*, 8 Cranch, 181; *The Aurora*, 8 Cranch, 203; *The Hiram*, 1 Wheat. 440, and *The Ariadne*, 2 Wheat. 143.

The case of *The Julia* was thus stated by Mr. Justice Story:

'It is sufficient to declare that we hold that the sailing on a voyage under the license and passport of protection of the enemy in furtherance of his views or interests, constitutes such an act of illegality as subjects the ship and cargo to confiscation as prize of war.'

Surely; but in the present case there was no license or passport of protection for the voyage in furtherance of the views and interests of the enemy, but the obnoxious instrument was a personal passport to Solis, dated April 13, 1897, more than a year before the war, in the following terms: 'Don José R. Solis Velasquez, native of Santiago de las Vegas, province of Havana, by profession a merchant, dwells in Marina street, No. —, and resides habitually in that ward and at that number.' Were these personal passports, one given long before the war and the other a mere permission to enter cities on the island, at all similar to the case of *The Julia*, where, as the opinion in that case shows, 'The master was a part owner of the vessel and cargo, and the regular depository of all the

papers connected with the voyage. It is utterly incredible that he should not recollect, in his examination, the existence of these British documents. They were put on board for the *special safeguard and security of the vessel and cargo.*'

In the case of *The Aurora*, a formal passport or permit had | been given p. 397
by the British consul to ' the American ship Aurora, William Augustus Pike, master, burthen 257 tons, now lying in Newburyport, etc., . . . requesting all officers commanding his majesty's ships of war, or private armed vessels belonging to subjects of his majesty, not only to suffer the said Aurora to pass without molestation, but also to extend to her all due assistance and protection in the prosecution of her voyage to the West Indies,' etc. The judgment of the court was thus stated : ' The acceptance and use of an enemy's license on a voyage to a neutral port, prosecuted in furtherance of the enemy's avowed objects, is illegal, and subjects vessel and cargo to confiscation.'

In the case of *The Hiram*, the vessel was sailing under protection of an enemy's license to the vessel, and this was held to have been in principle an offence of trading with the enemy. In the case of *The Ariadne*, the vessel was sailing with a license or passport of protection from the enemy's admiral.

It is scarcely necessary to say that a personal passport given to Solis, a Cuban, more than a year before the war, cannot be regarded as intended as a passport or protection to a British vessel, sailing under a British flag, on an errand friendly to the United States and their allies. And as respects the permission Solis had obtained from the Spanish consul to enter the cities to which he was bound, ' and take passengers, refugees,' such permission was in furtherance of humanity and not of any warlike object or interest.

The conclusions reached may be summarized thus :

(1) The port of Guantanamo was intentionally and as matter of policy left open and free to neutral commerce, not contraband, by the President's proclamations, and the Adula had a clear right to sail for and enter that port, even if aware that war vessels of the United States were in occupancy of the port. Such war vessels would, of course, have a right to prevent the Adula from entering the port if such entry would interfere with any military operation in hand.

(2) It was not competent for the commander of the fleet to extend the proclaimed blockade so as to include a port exempted by the President's proclamation, and to thus make prize | of war a neutral vessel approaching p. 398
such port on a peaceful errand.

(3) If an immediate exigency—and none such is shown to have existed in the present case—justified the Admiral of the United States in prohibiting the entrance of neutral vessels, sound principles of international law

required that such vessels should be warned on approaching the port, and they could not be seized as lawful prize, unless they disregarded the warning and attempted again to enter.

This is no time, in the history of international law, for the courts of the United States, in laying down rules to affect the rights of neutrals engaged in lawful commerce, to extend and apply harsh decisions made a hundred years ago, in the stress of the bitter wars then prevailing, when the rights of the comparatively feeble neutral states were wholly disregarded. Still less should our courts, as it seems to me was done in this case by the District Court, adopt strained and unnatural constructions of facts and circumstances, in order to subject vessels of nations with whom we are at peace to seizure and condemnation.

I am authorized to say that MR. JUSTICE GRAY, MR. JUSTICE WHITE and MR. JUSTICE PECKHAM concur in this dissent.

The Panama.

(176 U.S. Reports, 535) 1900.

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE SOUTHERN DISTRICT OF FLORIDA.

No. 127. Argued November 3, 1899.—Decided February 26, 1900.

No general rule of international law exempts mail ships from capture as prize of war.

A Spanish mail steamship, carrying mail of the United States from New York to Havana at the time of the breaking out of the recent war with Spain, was not exempt from capture by the sixth clause of the President's proclamation of April 26, 1898. |

p. 536 At the time of the breaking out of the recent war with Spain, a Spanish mail steamship was on a voyage from New York to Havana, carrying a general cargo, passengers and mails, and having mounted on board two breech-loading Hontoria guns of nine centimetre bore, and one Maxim rapid-firing gun, and having also on board twenty Remington rifles and ten Mauser rifles, with ammunition for all the guns and rifles, and thirty or forty cutlasses. Her armament had been put on board more than a year before, for her own defence, as required by her owner's mail contract with the Spanish Government, which also provided that, in case of war, that government might take possession of the vessel with her equipment, increase her armament, and use her as a war vessel, and, in these and other provisions, contemplated her use for hostile purposes in time of war. *Held*, that she was not exempt from capture as prize of war by the fourth clause of the President's proclamation of April 26, 1898.

THE statement of the case will be found in the opinion of the court.

Mr. J. Parker Kirlin for appellant.

Mr. Assistant Attorney General Hoyt for appellees. *Mr. Joseph K. McCammon* and *Mr. James H. Hayden*, of counsel for the captors, were on his brief.

Mr. George A. King and *Mr. William B. King*, solicitors for certain captors, filed a brief on their behalf.

MR. JUSTICE GRAY delivered the opinion of the court.

This was a libel for the condemnation of the steamship Panama as prize of war, and was heard in the District Court upon the libel, the claim of the master in behalf of the owner of the vessel, and the depositions *in preparatorio* of her master, her supercargo, and her chief engineer, which showed the following state of facts :

The Panama was a steamship of 1432 tons register ; was owned by the Compania Transatlantica, a corporation of Barcelona in Spain ; sailed under the Spanish flag ; had a commission as a royal mail ship from the Government of Spain ; carried a crew of 71 men all told, who had been shipped at different times at Havana ; and her usual course of voyage included the ports of New York and Havana, and Progreso, Vera Cruz and other Mexican ports, with general cargoes, passengers and mails. |

Her last voyage began in Havana, for a round trip by way of New p. 537
York, and was to have ended in Vera Cruz. She sailed from New York at half past two o'clock in the afternoon of April 20, 1898, with a clearance from the custom-house at that port for Havana, Progreso, and Vera Cruz, having on board the United States mails, 29 passengers (all Spaniards except one Frenchman) and a general cargo, the produce or manufacture of the United States, shipped at New York, and to be delivered, at the risk of the shippers, to consignees at those ports. She pursued the usual course of ships bound southward along the coast until she passed Alligator Reef light on the coast of Florida, and then bore away for Havana, and sighted the Cuban coast on the morning of April 25 ; and on that day, when about twenty-five miles from Havana, was captured by the United States ship of war Mangrove, and was sent in charge of a prize crew into Key West. She had no military or naval officer on board, made no resistance to the capture, and delivered all her papers and mails to the prize master.

There were mounted on board the Panama, at the time of her capture, five guns : Two breech-loading Hontoria 9 centimetre guns, one on each side of the ship, with 30 rounds of shot for each ; one Maxim rapid-firing gun, on the bridge, with ammunition ; and two signal guns, one on each side of the pilot house, with ammunition. She also had on board about twenty Remington rifles, and ten Mauser rifles, with ammunition for each, and about thirty or forty cutlasses. The cannon had been put on board about three years before, and the small arms and ammunition had been on board a year or more. She was so armed in accordance with a contract with the Spanish Government, which required all the mail steamships of the company to be armed, and article 26 of which was as follows : ' Every ship shall take on board, for her own defence, the following armament : Two Hontoria 9 centimetre guns,

with powder and ammunition for 30 shots for each piece; twenty Remington rifles, with 100 rounds apiece, and bayonet or sword-bayonet; and twenty cutlasses.'

p. 538 The master of the Panama moved the court to allow further | proof upon the matters set forth in two test affidavits, filed by leave of the court, in which he testified more distinctly that the mounted guns and small arms which the Panama carried had not been shipped for the purpose of war, or in expectation of hostilities between the Spanish Government and the United States, but were taken on board pursuant to the requirements of that contract; and also testified that the Spanish Government had never taken possession of the Panama under the terms of the contract; and that until the capture he and his officers were ignorant of the existence of the war between Spain and the United States, and of any blockade of the port of Havana. And he asked leave to submit to the court the whole contract, as contained in a printed book, which was in the chart room of the Panama, and in the custody of the prize master, and which has since been sent up to this court as one of the exhibits in the cause.

By that contract, concluded between the Spanish Government and the Compania Transatlantica on November 18, 1886, and drawn up and printed in Spanish, the company bound itself to establish and to maintain for twenty years various lines of mail steamships, one of which included Havana, New York and other ports of the United States and of Mexico; and the Spanish Government agreed to pay certain subsidies to this company, and not to subsidize other steamship lines between the same points. Among the provisions of the contract, besides article 26, above quoted, were the following:

By article 25, new ships of the West Indian line must be of iron, or of the material which experience may prove to be the best; must have double-bottomed hulls, divided into water-tight compartments, with all the latest improvements known to the art of naval construction; and 'their deck and sides shall have the necessary strength to support the artillery that they are to mount.' All the ships of that line must have a capacity for 500 enlisted men on the orlop deck, and a convenient place for them on the main deck. The company, when beginning to build a new ship, shall submit to the Minister of the Colonies her plans as prepared for commercial and postal service; 'the Minister shall

p. 539 cause to be studied the measures | that should be taken looking to the rapid mounting in time of war of pieces of artillery on board of said vessel; and may compel the company to do such strengthening of the hull as he may deem necessary for the possible mounting of that artillery; said strengthening shall not be required for a greater number than six pieces whose weight and whose force of recoil do not exceed those of

a piece of fourteen centimetres.' The plans of ships already built shall be submitted to the Minister of Marine, in order that he may cause to be studied the measures necessary to adapt them to war service; and any changes that he may deem necessary or possible for that end shall be made by the company. But in both old and new ships the changes proposed by the Ministry must be such as not to prejudice the commercial purposes of the vessels.

By article 35, the vessels, with their engines, armaments and other appurtenances, must be constantly maintained in good condition for service.

By article 41, the officers and crews of the vessels, and, as far as possible, the engineers, shall be Spaniards.

By article 49, the company may employ its vessels in the transportation of all classes of passengers and merchandise, and engage in all commercial operations that will not prejudice the services that it must render to the State.

By article 60, when by order of the Government munitions of war shall be taken on board, the company may require that it shall be done in the manner and with the precautions necessary to avoid explosions and disasters.

By article 64, in case of the suspension of the mail service by a naval war, or by hostilities in any of the seas or ports visited by the company's ships, the Government may take possession of them with their equipment and supplies, having a valuation of the whole made by a commission composed of two persons selected by the Government, two by the company, and a fifth person chosen by those four; at the termination of the war, the vessels with their equipment are to be returned to the company, and the Government is to pay to the company an indemnity for any diminution in their value, according to the opinion of the commission, and is also, for | the time it has the vessels in its service, to pay p. 540
five per cent on the valuation aforesaid. By article 66, at the end of the war, the Government may relieve the company of the performance of the contract if the casualties of the war have disabled it from continuing the service. And by article 67, in extraordinary political circumstances, and though there be no naval war, the Government may charter one or more of the company's vessels, and in that event shall pay an indemnity estimated by the aforesaid commission.

The District Court denied the motion of the master to take further proof; restored parts of the cargo to claimants thereof; gave claimants of other parts of the cargo leave to introduce further proof; and entered a final decree of condemnation and sale of the Panama and the rest of her cargo, upon the ground that she was enemy's property, and was upon the high seas at the time of the President's proclamation exempting

certain vessels from arrest. 87 Fed. Rep. 927. The court also, on the application of the commodore commanding at Key West, and on the recommendation of the prize commissioners, ordered all the mounted guns and the ammunition therefor to be appraised by two officers of the Navy, and delivered to the commodore for the use of the Navy Department. The master of the Panama appealed to this court from the decree condemning the vessel.

The recent war with Spain, as declared by the act of Congress of April 25, 1898, c. 189, and recognized in the President's proclamation of April 26, 1898, existed on and after April 21, 1898. 30 Stat. 364, 1770. This proclamation declared, among the rules on which the war would be conducted, the following :

'4. Spanish merchant vessels, in any ports or places within the United States, shall be allowed till May 21, 1898, inclusive, for loading their cargoes and departing from such ports or places ; and such Spanish merchant vessels, if met at sea by any United States ship, shall be permitted to continue their voyage if, on examination of their papers, it shall appear that their cargoes were taken on board before the expiration
p. 541 of the above term : Provided, that nothing herein contained shall | apply to Spanish vessels having on board any officer in the military or naval service of the enemy, or any coal (except such as may be necessary for their voyage) or any other article prohibited or contraband of war, or any despatch of or to the Spanish government.'

'6. The right of search is to be exercised with strict regard for the rights of neutrals, and the voyages of mail steamers are not to be interfered with except on the clearest grounds of suspicion of a violation of law in respect of contraband or blockade.'

It has been decided by this court, in the recent case of *The Buena Ventura*, 175 U. S. 384, that a Spanish merchant vessel, which had sailed before April 21, 1898, from a port of the United States on a voyage to a foreign port, not having on board any officer in the military or naval service of Spain, nor any article contraband of war, nor any despatch of or to the Spanish government, was protected by the fourth clause of the President's proclamation of April 26, 1898, from condemnation while on that voyage ; but that her capture, before that proclamation was issued, was with probable cause ; and that she should therefore be ordered to be restored to her owner, but without damages or costs.

That case would be decisive of this one, but for the mails and the arms carried by the Panama, and the contract with the Spanish Government under which the arms were put on board.

It was argued in behalf of the claimant that, independently of her being a merchant vessel, she was exempt from capture by reason of her being a mail steamship and actually carrying mail of the United States.

There are instances in modern times, in which two nations, by convention between themselves, have made special agreements concerning mail ships. But international agreements for the immunity of the mail ships of the contracting parties in case of war between them have never, we believe, gone farther than to provide, as in the postal convention between the United States and Great Britain in 1848, in that between Great Britain and France in 1833, and in other similar conventions, | that the mail packets of the two nations shall continue their navigation, p. 542 without impediment or molestation, until a notification from one of the governments to the other that the service is to be discontinued ; in which case they shall be permitted to return freely, and under special protection, to their respective ports. And the writers on international law concur in affirming that no provision for the immunity of mail ships from capture has as yet been adopted by such a general consent of civilized nations as to constitute a rule of international law. 9 Stat. 969 ; Wheaton, (8th ed.) pp. 659–661, Dana's note ; Calvo, (5th ed.) §§ 2378, 2809 ; De Boeck, §§ 207, 208. De Boeck, in § 208, after observing that, in the case of mail packets between belligerent countries, it seems difficult to go farther than in the convention of 1833, above mentioned, proceeds to discuss the case of mail packets between a belligerent and a neutral country, as follows : ' It goes without saying that each belligerent may stop the departure of its own mail packets. But can either intercept enemy mail packets ? There can be no question of intercepting neutral packets, because communications between neutrals and belligerents are lawful, in principle, saving the restrictions relating to blockade, to contraband of war, and the like ; the right of search furnishes belligerents with a sufficient means of control. But there is no doubt that it is possible, according to existing practice, to intercept and seize the enemy's mail packets.'

The provision of the sixth clause of the President's proclamation of April 26, 1898, relating to interference with the voyages of mail steamships, appears by the context to apply to neutral vessels only, and not to restrict in any degree the authority of the United States, or of their naval officers, to search and seize vessels carrying the mails between the United States and the enemy's country. Nor can the authority to do so, in time of war, be affected by the facts that before the war a collector of customs had granted a clearance, and a postmaster had put mails on board, for a port which was not then, but has since become, enemy's country. Moreover, at the time of the capture of the Panama, this proclamation had not been | issued. Without an express order of the p. 543 Government, a merchant vessel is not privileged from search or seizure by the fact that it has a government mail on board. *The Peterhoff*, 5 Wall, 28, 61.

The mere fact, therefore, that the Panama was a mail steamship, or that she carried mail of the United States on this voyage, does not afford any ground for exempting her from capture.

The remaining question in the case is whether the Panama came within the class of vessels described in the fourth clause of the President's proclamation of April 26, 1898, as 'Spanish merchant vessels,' and as not 'Spanish vessels having on board any officer in the military or naval service of the enemy, or any coal (except such as may be necessary for their voyage) or any other article prohibited or contraband of war, or any despatch of or to the Spanish government.'

On the part of the claimant, it was argued that the arms which the Panama carried, under the requirements of her mail contract and for the protection of the mails, are not to be regarded as contraband or munitions of war, within the sense of this clause; that 'contraband,' as therein referred to, means contraband cargo, not contraband portion of the ship's permanent equipment; and that, if the furnishings of a ship could be regarded as contraband, every ship would have contraband on board.

On the other hand, it was contended, in support of the condemnation, that the arms which the Panama carried, belonging to her owner, were contraband of war, and rendered her liable to capture; and that by reason of her being so armed, and of the provisions of her mail contract with the Spanish government, requiring her armament, and recognizing the right of that government, in case of a suspension of the mail service by war, to take possession of her for warlike purposes, she cannot be considered as a merchant vessel, within the meaning of the proclamation, but must be treated like any regular vessel of the Spanish navy under similar circumstances.

The claimant much relied on a case decided in 1800 by the French
p. 544 Council of Prizes, in accordance with the opinion and | report of Portalis, himself a high authority. Wheaton, (8th ed.) p. 460; De Boeck, § 81. In the case referred to, an American vessel, carrying ten cannon of various sizes, together with muskets and munitions of war, had been captured by French frigates; and had been condemned by two inferior French tribunals, upon the ground that she was armed for war, and had no commission or authority from her own government. The claimants contended that their ship, being bound for India, was armed for her own defence, and that the munitions of war, the muskets and the cannon that composed her armament did not exceed what was usual in like cases for long voyages. Upon this point, Portalis, acting as commissioner of the French government, reported his conclusion on the question of armament as follows: 'For my part, I do not think it is enough to have or to carry arms, to incur the reproach of being armed for war. Armament

for war is of a purely offensive nature. It is established when there is no other object in the armament than that of attack, or, at least, when everything shows that such is the principal object of the enterprise then a vessel is deemed enemy or pirate, if she has no commission or papers sufficient to remove all suspicion. But defence is a natural right, and means of defence are lawful in voyages at sea, as in all other dangerous occupations of life. A ship which had but a small crew, and a considerable cargo, was evidently intended for commerce, and not for war. The arms found on this ship were evidently intended, not for committing acts of rapine or hostility, but for preventing them ; not for attack, but for self-defence. The pretext of being armed for war therefore appears to me to be unfounded.' The Council of Prizes, upon consideration of the report of Portalis, adjudged that the capture of the vessel and her cargo was null and void, and ordered them to be restored, with damages. *The Pégou*, or *Pigou*, 2 Pistoye et Duverdy, Prises Maritimes, 51 ; *S. C.* 2 Cranch, 96–98, and note.

But in that case the only question at issue was whether a neutral merchant vessel, carrying arms solely for her own defence, was liable to capture for want of a commission as a vessel of war or privateer. That the capture took place while there | was no state of war between p. 545
France and the United States is shown by her being treated, throughout the case, as a neutral vessel ; if she had been enemy's property, she would have been lawful prize, even if she had a commission, or if she were unarmed. She was not enemy's property, nor in the enemy's possession, nor bound to a port of the enemy ; nor had her owner made any contract with the enemy by which the enemy was, or would be, under any circumstances, entitled to take and use her, either for war, or for any other purpose.

Generally speaking, arms and ammunition are contraband of war. In *The Peterhoff*, 5 Wall. 28, Chief Justice Chase, delivering the judgment of this court, said : ' The classification of goods as contraband or not contraband has much perplexed text-writers and jurists. A strictly accurate and satisfactory classification is perhaps impracticable ; but that which is best supported by American and English decisions may be said to divide all merchandise into three classes. Of these classes, the first consists of articles manufactured, and primarily and ordinarily used, for military purposes in time of war ; the second, of articles which may be and are used for purposes of war or peace, according to circumstances ; and the third, of articles exclusively used for peaceful purposes. Merchandise of the first class, destined to a belligerent country or places occupied by the army or navy of a belligerent, is always contraband ; merchandise of the second class is contraband only when actually destined to the military or naval use of a belligerent ; while merchandise

of the third class is not contraband at all, though liable to seizure and condemnation for violation of blockade or siege.' And it was adjudged that so much of the cargo of the Peterhoff, as consisted of artillery harness, artillery boots, and army shoes and blankets, came fairly under the description of goods primarily and ordinarily used for military purposes in time of war; and, being destined directly for the use of the rebel military service, came within the second, if not within the first class of goods contraband of war. 5 Wall. 58.

Yet it must be admitted that arms and ammunition are not contra-
p. 546 band of war, when taken and kept on board a merchant | vessel as part of her equipment, and solely for her defence against 'enemies, pirates and assailing thieves,' according to the ancient phrase still retained in policies of marine insurance. Pratt, in his essay on the Law of Contraband of War, speaking of the class of 'articles which are of direct use in war,' says: 'With respect to these no questions can arise. On proof of the use of the article being solely or particularly applicable to hostile purposes, the conveyance of it to the enemy would amount to such a direct interposition in the war as necessarily to entail the confiscation of the property.' But he afterwards adds this qualification: 'But even in the case of articles of direct use in war, an exception is always made in favor of such a quantity of them as may be supposed to be necessary for the use or defence of the ship.' And again, speaking of 'warlike stores,' he says: 'These are, from their very nature, evidently contraband; but every vessel is, of course, allowed to carry such a quantity as may be necessary for purposes of defence; this provision is expressly introduced in many treaties.' Pratt, Contraband of War, xxii, xxv, xl. And at pages 239, 244, 245 of his appendix he quotes express provisions to that effect in the treaties between Great Britain and Russia in 1766, 1797 and 1801. See also *Cases of Dutch and Spanish Ships*, 6 C. Rob. 48; *The Happy Couple*, Stewart Adm. (Nova Scotia) 65, 69; Madison, quoted in 3 Whart. Int. Law Dig. § 368, p. 313.

But the fact that arms carried by a merchant vessel were originally taken on board for her own defence is not conclusive as to her character. This is clearly shown by the case of *The Amelia*, (1801) reported by the name of *Talbot* v. *Seeman*, 1 Cranch, 1. In that case, during the naval warfare between the United States and France near the end of the last century, a neutral merchant vessel, having eight iron cannon and eight wooden guns mounted on board, and a cargo of merchandise, sailed from Calcutta for Hamburg, both being neutral ports; and before reaching her destination was captured by a French cruiser, and put by her captors, with the cannon still on board, in charge of a French prize crew, with directions to take her into a French port for adjudication as prize; and on
p. 547 her way | thither was recaptured by a United States ship of war. The

recapture was held to be lawful, and to entitle the recaptors to salvage before restoring the vessel to her neutral owner, because, as Chief Justice Marshall said, ' The Amelia was an armed vessel commanded and manned by Frenchmen,' ' she was an armed vessel under French authority, and in a condition to annoy the American commerce.' 1 Cranch, 32. And in *The Charming Betsy*, (1804) 2 Cranch, 64, that case was expressly approved, as a precedent to be followed under similar circumstances ; but was held to be inapplicable where the arms on board at the time of the recapture were but a single musket and a small amount of powder and ball. 2 Cranch, 121. Notwithstanding that the Amelia was a neutral vessel, with an armament originally taken on board for defence only, and therefore, while in the possession of her neutral owner, would not (according to the French case above cited) have been liable to capture as an armed vessel, yet, after she had been taken possession of by the enemy, with the same armament still on board, and thus was in a condition to be used by the enemy for hostile purposes, the fact that the original purpose of the armament was purely defensive did not prevent her from being considered as an armed vessel of the enemy.

While the authorities above referred to present principles and analogies worthy of consideration in the case at bar, they furnish no conclusive rule to govern its determination. The decision of this case must depend upon its own facts, and upon the true construction of the President's proclamation.

As to the facts, there is no serious dispute. The matters stated in the test affidavits upon which the motion for further proof was based add nothing of importance to the facts disclosed by the testimony *in preparatorio*, and by the mail contract between her owner and the Spanish Government, which forms part of the ship's papers.

The Panama was a steamship of 1432 tons register, carrying a crew of 71 men all told, owned by a Spanish corporation, sailing under the Spanish flag, having a commission as a royal mail ship from the Government of Spain, and plying from and to New York and Havana and various Mexican ports, with | general cargoes, passengers and mails. At p. 548
the time of her capture, she was on a voyage from New York to Havana, and had on board two breech-loading Hontoria guns of nine centimetre bore one mounted on each side of the ship, one Maxim rapid-firing gun on the bridge, twenty Remington rifles and ten Mauser rifles, with ammunition for all the guns and rifles, and thirty or forty cutlasses. The guns had been put on board three years before, and the small arms and ammunition had been on board a year or more. Her whole armament had been put on board by the company in compliance with its mail contract with the Spanish Government, (made more than eleven years

before, and still in force,) which specifically required every mail steamship of the company to 'take on board, for her own defence,' such an armament, with the exception of the Maxim gun and the Mauser rifles.

That contract contains many provisions looking to the use of the company's steamships by the Spanish Government as vessels of war. Among other things, it requires that each vessel shall have the capacity to carry 500 enlisted men; that that government, upon inspection of her plans as prepared for commercial and postal purposes, may order her deck and sides to be strengthened so as to support additional artillery; and that, in case of the suspension of the mail service by a naval war, or by hostilities in any of the seas or ports visited by the company's vessels, the Government may take possession of them with their equipment and supplies, at a valuation to be made by a commission; and shall, at the termination of the war, return them to the company, paying five per cent on the valuation while it has them in its service, as well as an indemnity for any diminution in their value.

The Panama was not a neutral vessel; but she was enemy property, and as such, even if she carried no arms, (either as part of her equipment, or as cargo,) would be liable to capture, unless protected by the President's proclamation.

It may be assumed that a primary object of her armament, and, in time of peace, its only object, was for purposes of defence. But that armament was not of itself inconsiderable, as appears, not only from the
p 549 undisputed facts of the case, but | from the action of the District Court, upon the application of the commodore commanding at the port where the court was held, and on the recommendation of the prize commissioners, directing her arms and ammunition to be delivered to the commodore for the use of the Navy Department. And the contract of her owner with the Spanish Government, pursuant to which the armament had been put on board, expressly provided that, in case of war, that government might take possession of the vessel with her equipment, increase her armament, and use her as a war vessel; and, in these and other provisions, evidently contemplated her use for hostile purposes in time of war.

She was, then, enemy property, bound for an enemy port, carrying an armament susceptible of use for hostile purposes, and herself liable, upon arrival in that port, to be appropriated by the enemy to such purposes.

The intent of the fourth clause of the President's proclamation was to exempt for a time from capture peaceful commercial vessels; not to assist the enemy in obtaining weapons of war. This clause exempts 'Spanish merchant vessels' only; and expressly declares that it shall

not apply to ' Spanish vessels having on board any officer in the military or naval service of the enemy, or any coal (except such as may be necessary for their voyage) or any other article prohibited or contraband of war, or any despatch of or to the Spanish Government.'

Upon full consideration of this case, this court is of opinion that the proclamation, expressly declaring that the exemption shall not apply to any Spanish vessel having on board any article prohibited or contraband of war, or a single military or naval officer, or even a despatch, of the enemy, cannot reasonably be construed as including, in the description of ' Spanish merchant vessels ' which are to be temporarily exempt from capture, a Spanish vessel owned by a subject of the enemy ; having an armament fit for hostile use ; intended, in the event of war, to be used as a war vessel ; destined to a port of the enemy ; and liable, on arriving there, to be taken possession of by the enemy, and employed as an auxiliary cruiser of the enemy's navy, in the war with this country. |

The result is, that the Panama was lawfully captured and condemned, p. 550
and that the decree of the District Court must be

Affirmed.

Mr. Justice Peckham dissented.

The Benito Estenger.

(176 U.S. Reports, 568) 1900.

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE SOUTHERN DISTRICT OF FLORIDA.

No. 192. Argued January 11, 12, 1900.—Decided March 5, 1900.

The general rule is that in time of war the citizens or subjects of the belligerents are enemies to each other without regard to individual sentiments or dispositions, and that political status determines the question of enemy ownership.

By the law of prize, property engaged in any illegal intercourse with the enemy is deemed enemy property, whether belonging to an ally or a citizen, as the illegal traffic stamps it with the hostile character and attaches to it all the penal consequences.

Provisions are not, in general, deemed contraband ; but they may become so if destined for the army or navy of the enemy, or his ports of naval or military equipment.

In dealing with a vessel asserted to be an enemy vessel, the fact of trade with the enemy in supplies necessary for the enemy's forces is of decisive importance. |

Individual acts of friendship cannot change political status where there is no open p. 569
adherence to the opposite cause and former allegiance remains apparently unchanged.

A consul has no authority by reason of his official station to grant exemption from capture to an enemy vessel ; and this vessel was not entitled to protection by reason of any engagement with the United States.

In cases of peculiar hardship, or calling for liberal treatment, it is not for the courts, but for another department of the Government, to extend such amelioration as the particular instance may demand.

Transfers of vessels *flagrante bello* cannot be sustained if subjected to any condition by which the vendor retains an interest in the vessel or its profits, a control over it, or a right to its restoration at the close of the war.

The burden of proof in respect of the validity of such transfers is on the claimant, and the court holds as to the transfer in this case that the requirements of the law of prize were not satisfied by the proofs.

THE Benito Estenger was captured by the U. S. S. Hornet on June 27, 1898, off Cape Cruz on the south side of the island of Cuba, and was brought into the port of Key West and duly libelled on July 2. The depositions *in preparatorio* of Badamero Perez, Edwin Cole and Enrique de Messa were taken, and thereafter and on July 27 a claim was interposed by Perez as master of the steamer on behalf of Arthur Elliott Beattie, a British subject, as owner, supported by test affidavits of himself and de Messa. The cause was preliminarily heard on the libel, the depositions *in preparatorio* and the test affidavits, and sixty days given for further proofs. Accordingly the depositions of the claimant and sundry others were taken on behalf of the claimant, and the testimony of the consul of the United States at Kingston on behalf of the captor. The cause coming on for final hearing, the court entered a decree December 7, 1898, condemning the vessel as lawful prize as enemy property, and ordering her to be sold in accordance with law. Claimant thereupon appealed, and assigned errors to the effect in substance that the court erred in failing to hold that the Benito Estenger was a British merchant ship, duly documented and entitled to the protection of the British flag, and lawfully owned and registered by a subject domiciled in Great Britain ; and also in holding that the Benito Estenger was lawful prize of
p. 570 war, inasmuch as she was engaged on a voyage in | behalf of the local Cuban junta in Kingston, allies of the United States, and when captured was in the service of the United States, and employed in friendly offices to the forces of the United States. The vessel prior to June 9, 1898, was the property of Enrique de Messa, of the firm of Gallego, de Messa and Company, subjects of Spain and residents of Cuba. On that day a bill of sale was made by de Messa to the claimant, Beattie, a British subject, and, on compliance with the requirements of the British law governing registration, was registered as a British vessel in the port of Kingston, Jamaica. The vessel had been engaged in trading with the island of Cuba, and more particularly between Kingston and Montego, Jamaica, and Manzanillo, Cuba. She left Kingston on the 23d of June, and proceeded with a cargo of flour, rice, cornmeal and coffee to Manzanillo, where the cargo was discharged. She cleared from Manzanillo at 2 o'clock A.M., June 27, for Montego, and then for Kingston, and was captured at half-past five of that day off Cape Cruz. The principal question was as to the ownership of the vessel and the legality of the alleged transfer, but other collateral questions were raised in respect of the alleged Cuban sym-

pathies of de Messa; service on behalf of the Cuban insurgents in the United States; and the relation of the United States consul to the transactions which preceded the seizure. It was argued that the vessels of Cuban insurgents and other adherents could not be deemed property of the enemies of the United States; that this capture could not be sustained on the ground that the vessel was such property; that the conduct of de Messa in his sale to Beattie was lawful, justifiable, and the only means of protecting the vessel as neutral property from Spanish seizure; and finally, that this court could and should do justice by ordering restitution, under all the circumstances of the case.

Mr. Harrington Putnam for claimant.

Mr. Assistant Attorney General Hoyt for the United States. *Mr. Joseph K. McCammon* and *Mr. James H. Hayden*, counsel for captors, were on his brief. |

Mr. George A. King and *Mr. William B. King* filed a brief on behalf p. 571
of captors.

Mr. Chief Justice Fuller, after stating the case, delivered the opinion of the court.

If the alleged transfer was colorable merely, and Messa was the owner of the vessel at the time of capture, did the District Court err in condemning the Benito Estenger as lawful prize as enemy property?

'Enemy property' is a technical phrase peculiar to prize courts, and depends upon principles of public policy as distinguished from the common law. The general rule is that in war the citizens or subjects of the belligerents are enemies to each other without regard to individual sentiments or dispositions, and that political status determines the question of enemy ownership. And by the law of prize, property engaged in any illegal intercourse with the enemy is deemed enemy property, whether belonging to an ally or a citizen, as the illegal traffic stamps it with the hostile character and attaches to it all the penal consequences. *Prize cases*, 2 Black, 635, 674; *The Sally*, 8 Cranch, 382, 384; *Jecker* v. *Montgomery*, 18 How. 110; *The Peterhoff*, 5 Wall. 28; *The Flying Scud*, 6 Wall. 263.

Messa was a Spanish subject, residing at Santiago, and for years engaged in business there. His vessel had a Spanish crew and Spanish officers, and he testified that he was on board of her as supercargo. She had the Spanish flag in her lockers, though she was flying the British flag at the moment, under a transfer, which, as presently to be seen, was colorable and invalid. There was evidence tending to show that Messa sympathized with the Cuban insurgents, but no proof that he was himself a Cuban rebel or that he had renounced his allegiance to Spain. The vessel carried to Manzanillo on this voyage a cargo of provisions, consisting principally of eleven hundred barrels of flour.

Manzanillo was a city of several thousand inhabitants and the first

p. 572 important place on the south Cuban coast between | Santiago and Cienfuegos, lying inside the bay formed by the promontory which Cape Cruz terminates, and about sixty miles northeast of the cape. Cape Cruz is about due north from Montego Bay on the northwestern shore of Jamaica, and about seventy-five miles distant, while Kingston is on the southeastern coast of Jamaica. The record lacks evidence of the condition of affairs there at that time, but official reports leave no doubt that it was defended by several vessels of war and by shore batteries, and was occupied by some thousands of Spanish soldiers. On the 6th of April, 1898, the Secretary of the Navy had instructed Admiral Sampson, among other things, that the Department desired, 'That in case of war, you will maintain a strict blockade of Cuba, particularly the ports of Havana, Matanzas, and, if possible, Santiago de Cuba, Manzanillo and Cienfuegos.' Manzanillo was the terminus of a cable which connected with Santa Cruz, Trinidad, Cienfuegos and Havana, and was subsequently cut by the forces of the United States, in order to check the inland traffic with Manzanillo and to prevent the calling of reënforcements to resist the capture of that place. And it appeared that Admiral Sampson had been for some weeks endeavoring to stop blockade running on the south coast of Cuba, and that a large vessel with a heavy battery was stationed at Cape Cruz. Manzanillo was not declared blockaded, however, until the proclamation of June 27, 1898; but the consul of the United States at Kingston had warned Messa and Beattie that a blockade in fact existed. The claimant testified that the vessel was chartered by Flouriache, a Cuban merchant, and that the cargo was consigned to Bauriedel and Company, at Manzanillo. The deposition of neither of these was taken. According to the explicit testimony of the consul, he was informed by both the claimant and his brother that the flour was transferred by Bauriedel and Company, through a communicating way from their warehouse to the Spanish government warehouse, immediately upon its delivery; and no evidence to contradict this was introduced.

The instructions of the Navy Department to 'Blockading Vessels
p. 573 and Cruisers,' in the late war, included among articles | conditionally contraband, 'Provisions, when destined for an enemy's ship or ships, or for a place that is besieged.'

In *The Commercen*, 1 Wheat. 382, 388, Mr. Justice Story said: 'By the modern law of nations provisions are not, in general, deemed contraband; but they may become so, although the property of a neutral, on account of the particular situation of the war, or on account of their destination. . . . If destined for the ordinary use of life in the enemy's country, they are not, in general, contraband; but it is otherwise if destined for military use. Hence, if destined for the army or navy of

the enemy, or for his ports of naval or military equipment, they are deemed contraband.'

In *The Jonge Margaretha*, 1 C. Rob. 189, 193, Sir William Scott discussed this question, and, after referring to many instances, concluded: 'And I take the modern established rule to be this, that generally they are not contraband, but may become so under circumstances arising out of the particular situation of the war, or the condition of the parties engaged in it.'

But while alluding to this subject by way of illustration we do not feel called on to consider under what particular circumstances, generally speaking, provisions may be held contraband of war. It is enough that in dealing with a vessel adjudicated to have been an enemy vessel, the fact of trade with the enemy, especially in supplies necessary for the enemy's forces, is of well nigh decisive importance.

In reply it is suggested that this cargo was intended for the Cuban insurgents, and a quotation is made from a letter of the consul to the effect that he had been 'told privately by the president of the local junta, who has performed valuable services for me, that the proceeds of this cargo are to be forwarded to the Cuban government and troops through the Cuban agent at Manzanillo.' The suggestion derives no support from the record, and the facts remain that the provisions were delivered to the Spanish government, and that the trade to this Spanish stronghold constituted, under the laws of war, illicit intercourse with the enemy.

This brings us to consider the contention that Messa had | rendered p. 574
important services to the United States; that he was the friend and not the enemy of this Government, and that there was an agreement between him and the United States consul which operated to protect the vessel from capture. But Messa's status was that of an enemy, as already stated, and this must be held to be so notwithstanding individual acts of friendship, certainly since there was no open adherence to the Cuban cause, and allegiance could have been shifted with the accidents of war. The legal conclusion was not affected by the fact that Messa had, in cultivating friendly relations with the consul, given the latter an old Government plan of the province of Santiago and an especially prepared chart of the harbor. Thus displaying his amicable inclinations, he endeavored to obtain from the consul a letter of protection for the voyage he was about to undertake, but this the consul declined to furnish, and informed him at the same time that Manzanillo was blockaded, and that the contemplated venture would be at his own risk.

Nevertheless, the consul agreed to write the Admiral, and did write him June 23, that Messa offered to give certain information that might be valuable, and that he proposed to be off Cape Cruz on June 30, when

he could be picked up there and taken to the Admiral if desired; but the consul said: 'You quite understand that in dealing with those people, one is always more or less liable to imposition. I therefore make no recommendation of Messa to you.' There was nothing to show that the voyage was undertaken on the strength of this letter or that it in any way contributed to the capture, nor that the Admiral intended to avail himself of the suggestion in regard to Messa.

The claimant asserted and the consul denied that protection to the voyage was extended by the latter. But we do not go at length into this matter because we think that no engagement with the United States nor any particular service to the United States was made out in that connection, and so far as appears the vessel was captured in the ordinary course of cruising duty at a time and under circumstances when her
p. 575 liability was not to be denied. Moreover, a United States | consul has no authority by virtue of his official station to grant any license or permit the exemption of a vessel of an enemy from capture and confiscation. This was so held by Judge McCaleb in *Rogers* v. *The Amado*, Newberry, 400, in which he quotes the language of Sir William Scott in *The Hope*, 1 Dodson, 226, 229: 'To exempt the property of enemies from the effect of hostilities, is a very high act of sovereign authority; if at any time delegated to persons in a subordinate situation, it must be exercised either by those who have a special commission granted to them for the particular business, and who, in legal language, are termed *mandatories*, or by persons in whom such a power is vested in virtue of any official situation to which it may be considered incidental. It is quite clear that no consul in any country, particularly in an enemy's country, is vested with any such power in virtue of his station. "*Ei rei non præponitur;*" and therefore his acts relating to it are not binding.'

In *The Joseph*, 8 Cranch, 451, the vessel was condemned for trading with the enemy, and it was held that she was not excused by the necessity of obtaining funds to pay the expenses of the ship, nor by the opinion of an American minister expressed to the master, that by undertaking the voyage he would violate no law of the United States. The court said that these considerations, 'if founded in truth, present a case of peculiar hardship, yet they afford no legal excuse which it is competent to this court to admit as the basis of its decision.'

This is equally true of the case before us, for even if the circumstances may have justified liberal treatment, that cannot be permitted to influence our decision. It belongs to another department of the Government to extend such amelioration as appears to be demanded in particular instances.

Neither the case of *Les Cinq Frères*, 4 Lebau's Nouveau Code des Prises, 63, nor that of *The Maria*, 6 C. Rob. 201, cited by counsel, is

in point. In the former, the Committee of Public Safety in the year three of the French calendar of the Revolution decreed the condemnation of Les Cinq Frères as an enemy's vessel, and of her cargo although belonging to Frenchmen, but further decreed restitution of the cargo or its | value, as matter of grace, in consideration of services rendered by p. 576 the claimants in furnishing provisions to the Republic, adding that this should not be drawn into a precedent. The latter simply involved the interpretation of an indulgence specifically granted by the British government.

Thus far we have proceeded on the assumption that the transfer of the Benito Estenger was merely colorable, and this, if so, furnished in itself ground for condemnation. A brief examination of the evidence, in the light of well-settled principles, will show that the assumption is correct.

Messa's story of the transfer was that the steamer had been owned by Gallego, Messa and Company, and then by himself; that he was compelled to sell in order to get money to live on; that he made the sale for $40,000, for which, or a large amount of which, credit was given on an indebtedness of Messa to Beattie and Company, and that he was employed by Beattie to go on the vessel as his representative and business manager.

It appeared that Beattie applied to the customs and shipping office in Jamaica for a British register, lodged with him the bill of sale, and made a declaration of ownership before him as registrar of shipping, which documents were filed on June 9 and 14 respectively, and were in conformity with the requirements of British law. The depositions of the ship broker and his employés put the price at nine thousand pounds, and showed their belief that the sale was *bona fide*, founded on what passed between Messa and Beattie. They did not know what arrangements were made for the payment of the price or how or in what shape the purchase money was paid. The accountant stated that after the sale Beattie went on board and took possession of the vessel, and informed the officers in charge that he had become the owner, gave orders regarding her, and informed witness that he had given Messa the position as supercargo.

There was considerable confusion on the point as to who was master of the vessel after the transfer. Perez testified that he was, and as master he interposed the claim on behalf of Beattie. He also swore that Mr. Beattie 'informed him | that he could remain as master, but it would p. 577 be necessary for him to put an English subject on board as first officer or second captain, in conformity with the British law.' Cole, a British subject, asserted that he was master, and Beattie stated that he appointed him such with Perez as mate and pilot, while Messa said that Perez was master and that he, Messa, was supercargo. Perez had been the captain of the ship and remained on her, and conceding that Cole was

placed on board in the capacity of captain, the inference is not unreasonable that this was for appearances only.

Beattie testified that he was a member of the firm of Beattie and Company, composed of himself and his brothers, all British subjects, and interested in lands, sugar estates, mines and forests in the district of Manzanillo; that he had resided there for some years, returning to his parents' home in England for several months at a time; that he concluded the purchase of the Benito Estenger from Messa on June 9, 1898; that she left Jamaica on her last voyage on June 23, bound for Manzanillo, and chartered by Flouriache, a Cuban merchant, carrying a cargo of food stuffs sent for the purpose of trade; that he bought the vessel for nine thousand pounds; but he declined to state of what the payment or payments of the purchase money consisted, although saying that the sale was *bona fide*.

The consul testified that claimant, in conversation, while insisting that the transfer was absolute, admitted that it was effected for the purpose of protecting the vessel.

In short, the statements as to price were conflicting; the reason assigned for the sale was to get money to live on, and yet apparently no money passed, and Messa said that he received credit for a large part of the consideration on indebtedness to claimant's firm; claimant himself refused to describe the payment or payments; the Spanish master and crew remained in charge; Messa went on the voyage as supercargo; the vessel continued in trade, which, in this instance at least, appeared to be plainly trade with the enemy; and, finally, it is said by claimant's counsel in his printed brief: 'It will not be con-
p. 578 tended upon this appeal that all the interest of Mr. | Messa in the Benito Estenger ceased on June 9, 1898. The transfer was obviously made to protect the steamer as neutral property from Spanish seizure. That Mr. Messa, however, still retained a beneficial interest after this sale and transfer of flags, and continued to act for the vessel as supercargo, has not been disputed.'

The attempt to break the force of this admission by the contention that the change of flag was justifiable as made to avoid capture by the Spanish is no more than a reiteration of the argument that Messa was a Cuban rebel, and his vessel a Cuban vessel, which, as has been seen, we have been unable to concur in. If the transfer were invalid, she belonged to a Spanish subject, she was engaged in an illegal venture, and her owner cannot plead his fear of Spanish aggression.

Transfers of vessels *flagrante bello* were originally held invalid, but the rule has been modified, and is thus given by Mr. Hall, who, after stating that in France, 'their sale is forbidden, and they are declared to be prize in all cases in which they have been transferred to neutrals after

the buyers could have knowledge of the outbreak of the war ; ' says : ' In England and the United States, on the contrary, the right to purchase vessels is in principle admitted, they being in themselves legitimate objects of trade as fully as any other kind of merchandise, but the opportunities of fraud being great, the circumstances attending a sale are severely scrutinized, and the transfer is not held to be good if it is subjected to any condition or even tacit understanding by which the vendor keeps an interest in the vessel or its profits, a control over it, a power of revocation, or a right to its restoration at the conclusion of the war.' International Law, (4th ed.) 525. And to the same effect is Mr. Justice Story in his Notes on the Principles and Practice of Prize Courts, (Pratt's ed.) 63 ; 2 Wheat. App. 30 : ' In respect to the transfers of enemies' ships during the war, it is certain that purchases of them by neutrals are not, in general, illegal ; but such purchases are liable to great suspicion ; and if good proof be not given of their validity by a bill of sale and payment of a reasonable consideration, it will materially impair the validity of a neutral | claim ; . . . and if after such transfer the p. 579
ship be employed habitually in the enemy's trade, or under the management of a hostile proprietor, the sale will be deemed merely colorable and collusive. . . . Anything tending to continue the interest of the enemy in the ship vitiates a contract of this description altogether.'

The Sechs Geschwistern, 4 C. Rob. 100, is cited, in which Sir William Scott said : ' This is the case of a ship, asserted to have been purchased of the enemy ; a liberty which this country has not denied to neutral merchants, though by the regulation of France, it is entirely forbidden. The rule which this country has been content to apply is, that property so transferred, must be *bona fide* and absolutely transferred ; that there must be a sale divesting the enemy of all further interest in it ; and that anything tending to continue his interest, vitiates a contract of this description altogether.'

In *The Jemmy*, 4 C. Rob. 31, the same eminent jurist observed : ' This case has been admitted to farther proof, owing entirely to the suppression of a circumstance, which if the court had known, it would not have permitted farther proof to have been introduced ; namely, that the ship has been left in the trade, and under the management of her former owner. Wherever that fact appears, the court will hold it to be conclusive, because, from the *evidentia rei*, the strongest presumption necessarily arises, that it is merely a covered and pretended transfer. The presumption is so strong, that scarcely any proof can avail against it. It is a rule which the court finds itself under the absolute necessity of maintaining. If the enemy could be permitted to make a transfer of the ship, and yet retain the management of it, as a neutral vessel, it would be impossible for the court to protect itself against frauds.'

And in *The Omnibus*, 6 C. Rob. 71, he said: 'The court has often had occasion to observe, that where a ship, asserted to have been transferred, is continued under the former agency and in the former habits of trade, not all the swearing in the world will convince it that it is a genuine transaction.'

p. 580 The rule was stated by Judge Cadwalader of the Eastern | District of Pennsylvania thus: 'The rule of decision in some countries has been that, as to a vessel, no change of ownership during hostilities can be regarded in a prize court. In the United States, as in England, the strictness of this rule is not observed. But no such change of property is recognized where the disposition and control of a vessel continue in the former agent of her former hostile proprietors; more especially when, as in this case, he is a person whose relations of residence are hostile.' *The Island Belle*, 13 Fed. Cases, 168.

So in *The Baltica*, Spinks' Prize Cases, 264, several vessels had been sold by a father, an enemy, to his son, a neutral, immediately before the war, and only paid for in part, the remainder to be paid out of the future earnings thereof, and the Baltica, which was one of them, was condemned on the ground of a continuance of the enemy's interest.

In *The Soglasie*, Spinks' Prize Cases, 104, Dr. Lushington held the *onus probandi* to be upon the claimant, and made these observations: 'With regard to documents of a formal nature, though when well authenticated they are to be duly appreciated, it does not follow that they are always of the greatest weight, because we know, without attributing blame to the authorities under which they issue, they are instruments often procured with extraordinary facility. What the court especially desires is, that testimony which bears less the appearance of formality,—evidence natural to the transaction, but which often carries with it a proof of its own genuineness; the court looks for that correspondence and other evidence which naturally attends the transaction, accompanies it, or follows it, and which, when it bears upon the face of it the aspect of sincerity, will always receive its due weight.'

In *The Ernst Merck*, Spinks' Prize Cases, 98, the sale was to neutrals of Mecklenburg shortly before the breaking out of war, and it was ruled that the onus of giving satisfactory proof of the sale was on the claimant, and without it the court could not restore even though it was not called on to pronounce affirmatively that the transfer was fictitious and fraudulent. In that case the vessel was condemned partly because of absence
p. 581 of proof of payment, Dr. Lushington saying: 'We | all know that one of the most important matters to be established by a claimant is undoubted proof of payment.'

To the point that the burden of proof was on the claimant see also

The Jenny, 5 Wall. 183; *The Amiable Isabella*, 6 Wheat. 1; *The Lilla*, 2 Cliff. 169; Story's Prize Courts, 26.

We think that the requirements of the law of prize were not satisfied by the proofs in regard to this transfer, and on all the evidence are of opinion that the court below was right in the conclusion at which it arrived.

Decree affirmed.

Mr. Justice Shiras, Mr. Justice White and Mr. Justice Peckham dissented.

The Carlos F. Roses.

(177 U.S. Reports, 655) 1900.

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE SOUTHERN DISTRICT OF FLORIDA.

No. 243. Argued January 12, 1900.—Decided May 14, 1900.

The Carlos F. Roses, a Spanish vessel, owned at Barcelona, Spain, sailed from that port for Montevideo, Uruguay, with a cargo which was discharged there and a cargo of jerked beef and garlic taken on board for Havana, for which she sailed March 16, 1898. On May 17, while proceeding to Havana, she was captured by a vessel of the United States and sent to Key West, where she was libelled. A British company doing business in London, laid claim to the cargo on the ground that they had advanced money for its purchase to a citizen of Montevideo, and had received bills of lading covering the shipments. The vessel was condemned as enemy's property, but the proceeds of the cargo, which had been ordered to be sold as perishable property, was ordered to be paid to the claimants. *Held*,

(1) That as the vessel was an enemy vessel, the presumption was that the cargo was enemy's property, and this could only be overcome by clear and positive evidence to the contrary;

(2) That on the face of the papers given in evidence, it must be presumed that when these goods were delivered to the vessel, they became the property of the consignors named in the invoices; p. 656

(3) That the British company got the legal title to the goods and the right of possession only if such were the intention of the parties, and that that intention was open to explanation, although the persons holding the papers might have innocently paid value for them;

(4) That in prize courts it is necessary for the claimants to show the absence of anything to impeach the transaction, and at least to disclose fully all the surrounding circumstances, and that the claimants had failed to do so;

(5) That the right of capture acts on the proprietary interest of the thing captured at the time of the capture, and is not affected by the secret liens or private engagements of the parties;

(6) That in this case the belligerent right overrides the neutral claim, which must be regarded merely as a debt and the assignment as a cover to an enemy interest.

The Carlos F. Roses was a Spanish bark of 499 tons, hailing from Barcelona, Spain, sailing under the Spanish flag, and officered and manned by Spaniards. She had been owned for many years by Pedro Roses

Valenti, a citizen of Barcelona. Her last voyage began at Barcelona, whence she proceeded to Montevideo, Uruguay, with a cargo of wine and salt. All of the outward cargo was discharged at Montevideo, where the vessel took on a cargo consisting of jerked beef and garlic to be delivered at Havana, Cuba, and sailed for the latter port on March 16, 1898. On May 17, when in the Bahama Channel off Punta de Maternillos, Cuba, and on her course to Havana, she was captured by the United States cruiser New York and sent to Key West in charge of a prize crew. The bark and her cargo were duly libelled May 20. All of the ship's papers were delivered to the prize commissioners, and the deposition of Maristany, her master, was taken *in preparatorio*. Kleinwort Sons and Company of London, England, made claim to the cargo, consisting of a shipment of 110,256 kilos of jerked beef and 19,980 strings of garlic, and a further shipment of 165,384 kilos of jerked beef, alleging that they were its owners and that it was not lawful prize of war. In support of the claim the firm's agent in the United States filed a test affidavit made on information and
p. 657 belief. In this it was alleged that | Kleinwort Sons and Company were merchants in London ; that the members of the firm were subjects of the United Kingdom of Great Britain and Ireland ; that in February and March, 1898, the bark, being then in Montevideo, bound on a voyage to Havana, took on board a cargo of jerked beef and strings of garlic shipped by Pla Gibernau and Company, merchants of Montevideo, to be transported to the port of Havana, and there to be delivered to the order of the shippers according to the condition of certain bills of lading issued therefor by the bark to Pla Gibernau and Company ; that the members of the firm of Gibernau and Company were citizens of the Argentine Republic ; that the bark left Montevideo on March 16, and proceeded on her voyage to Havana, until May 17, when, being at a point in the Bahama Channel off Martinique, she was captured by the United States cruiser New York, without resistance on her part, and sent into Key West as prize of war. That after the shipment of the cargo in Montevideo claimants made advances to the shippers and owners of the cargo in the sum of £6297, British sterling, to wit, £2714 item thereof, upon the security of said lot of 110,256 kilos of jerked beef and 19,980 strings of garlic, and £3583 item thereof, upon the security of said lot of 165,384 kilos of jerked beef ; that at the time of making said advances and in consideration thereof, bills of lading covering the shipments were delivered to claimants duly indorsed in blank with the intent and purpose that they should thereby take title to said bills of lading, and to said shipments of jerked beef and garlic, and should, on the arrival of the vessel at her destination, take delivery of the shipments and hold the same as security for their said advances until paid, and with the right to dispose of said shipments and to apply the proceeds to the payment of their said

advances; and accordingly the said Kleinwort Sons and Company did become and ever since have been and still are as aforesaid the true and lawful owners of the said bills of lading and of the shipments of jerked beef and garlic therein referred to. The affidavits further stated that the advances were equivalent in money of the United States to about $30,644.35, and that no part of the same had been paid, or otherwise secured to be paid. |

The cause was heard on the libel and claims of the master of the bark and Kleinwort and Company, and the evidence taken *in preparatorio*. The vessel was condemned as enemy property, and the court ordered the claimants of the cargo to 'have sixty days in which to file further proof of ownership;' and because of its perishable nature the marshal of the court was ordered to advertise and sell the same, and deposit the proceeds in accordance to law. No appeal was taken on behalf of the vessel. The cargo was sold and the proceeds deposited with the assistant treasurer of the United States at New York, subject to the order of the court. The time for claimants to take further proofs was twice extended. No witnesses were produced by claimants, but Charles F. Harcke, claimants' manager in London, made three *ex parte* affidavits before the United States consul general, which were offered in evidence by claimants. Appended to the affidavits were a large number of exhibits purporting to be papers, or copies of papers, relating to the shipment of the cargo, and some of the financial transactions of some of those who had to do with it. From these affidavits and papers it appeared that the voyage of the Carlos F. Roses was a joint venture entered into by Pedro Pagés of Havana, a Spanish subject; the Spanish owners of the vessel, and Gibernau and Company. The whole cargo was made up of two shipments, one of jerked beef and one of garlic, which had been purchased by Gibernau and Company on commission, and by them delivered to the Carlos F. Roses 'consigned to order for account and risk and by order of the parties noted' in the invoices. The shipment of jerked beef containing 275,640 kilos in bulk was divided thus: 60 %, 165,384 kilos, 'to the expedition or voyage of the Carlos F. Roses;' 40 %, 110,256 kilos, 'to Mr. Pedro Pagés of Havana.' The shipment of garlic was divided thus: 9990 strings, 'account of Mr. Pedro Pagés,' and 9990 strings for 'account of' Gibernau and Company. Both invoices were signed by Gibernau and Company, and bore date March 11 and 12, 1898. p. 658

Harcke stated in one of his affidavits that: 'The said cargo was ultimately destined for Don Pedro Pagés, of Havana, who in the ordinary course of business would by payment to or indemnification | of Kleinwort Sons & Co. or their agents in that behalf take up the said bills of lading and thus be enabled thereon to take the goods. No payment whatever has been made to Messieurs Kleinwort Sons & Co., or their agents, on p. 659

account of the payments made by them through the said advances by said Don Pedro Pagés, or by any person on his behalf, or otherwise, and the said Kleinwort Sons & Co. have been and are wholly unindemnified in respect of their said payments except so far as the proceeds of the said cargo and the insurance thereon which as the owners of the said goods they have become entitled to collect, thereby subrogating to their own right to the extent of such payments the insurers of the said goods.'

The ship's manifest appears to have been signed by Maristany, her master, at Montevideo, on March 15, 1898, and was *viséd* by the Spanish consul at that port the previous day. It described the ship's destination as Havana, and her cargo as made up of two lots of jerked beef containing 248,076 kilos and 29,970 kilos respectively, and one lot of garlic containing 19,980 strings, all shipped by Gibernau and Company, ' to order.' On March 14, Maristany issued three bills of lading, in which it was stated that the shipments were received from Gibernau and Company for transportation to Havana ' for account and at the risk of whom it may concern ; ' one of the bills covering a shipment of 165,384 kilos of jerked beef ; another of 110,256 kilos of jerked beef ; and the third of 19,980 bunches of garlic.

March 15, Gibernau and Company drew this bill of exchange :

' No. 128. Montevideo, March 15, 1898. For £2714 13 8. Ninety days after sight you will please pay for this first of exchange (the second and third being unpaid), to the order of the London River Plate Bank, L'd, the sum of £2714 13 8, value received, which you will charge to the account of Pedro Pagés of Havana as per advice.

' Pla Gibernau & Co.

' To Messrs. Kleinwort Sons & Co., London.'

On the same day Maristany drew this bill of exchange :

p. 660 ' No. 129. Montevideo, March 15, 1898. For £3583 11 6. | Ninety days after sight you will please pay for this first of exchange (the second and third being unpaid), to the order of Pla Gibernau & Co. the sum of £3583 11 6, invoice value of jerked beef, per Carlos F. Roses, which you will charge to the account of P. Roses Valenti, of Barcelona, as per advice.

' Ysidro Bertran Maristany.

' To Messrs. Kleinwort Sons & Co., London.'

This was indorsed by Gibernau and Company.

Valenti was the managing owner of the Carlos F. Roses. Both bills of exchange passed through the London River Plate Bank, L't'd, at Montevideo. On April 6 they were accepted by Kleinwort Sons and Company, and on May 9 were paid under discount by that firm. Harcke alleged that at the time of the acceptance of these bills of exchange, bills

of lading covering the shipments of the garlic, and the jerked beef shipped for account and by order of Pagés, indorsed in blank by Gibernau and Company, were delivered to claimants, as security for the payment of the bills of exchange; and that thereafter the bill of lading covering the shipment of jerked beef made for the account and by the order of the Carlos F. Roses was delivered in like manner, but affiant did not state when. It was also alleged that on April 9 the bills of lading and invoices, covering the shipment of garlic and Pagés's share of the jerked beef were mailed by Kleinwort Sons and Company to Gelak and Company, bankers of Havana, to be held until the bills of exchange charged to the account of Pagés should be paid. Neither the instructions sent to Gelak and Company, nor a copy of them, were produced. Harcke further alleged that the bills of lading and the invoices covering the vessel's share of the shipment of jerked beef were retained by Kleinwort Sons and Company 'pending the disposal of the said cargo.' On May 17, the day of the capture, Kleinwort Sons and Company cabled Gelak and Company requesting them to return the bills of lading and invoices, which had been forwarded on April 9. June 9, Gelak and Company replied that the bills and invoices had not been received. On October 21 claimants produced these bills of lading, alleging that they had been received from Gelak and | Company on October 18, and that neither Pagés, Gibernau p. 661
and Company, nor the owners of the Carlos F. Roses had paid claimants anything for or on account of their acceptance and payment of the bills of exchange. The cause of the cargo was heard a second time on the claim, test affidavit, and Harcke's affidavits, and a decree was entered for the payment to claimants of the proceeds of sale; from which decree the United States took this appeal.

Mr. James H. Hayden and *Mr. Assistant Attorney General Hoyt* for the United States. *Mr. Joseph K. McCammon* was on their brief.

Mr. Wilhelmus Mynderse for the claimants.

Mr. Chief Justice Fuller, after stating the case, delivered the opinion of the court.

The President's proclamation of April 26, 1898, declared the policy of the government in the conduct of the war would be to adhere to the rules of the Declaration of Paris therein set forth, one of them being thus expressed: 'Neutral goods, not contraband of war, are not liable to confiscation under the enemy's flag.'

The question is whether this cargo when captured was enemy property or not. The District Court held that both the title and right of possession were in these neutral claimants at the time of the capture, 'as evidenced by the indorsed bills of lading and the paid bills of exchange,' and, therefore, entered the decree in claimant's favor. As the vessel was an enemy vessel the presumption was that the cargo was enemy's property, and

this could only be overcome by clear and positive evidence to the contrary. The burden of proving ownership rested on claimants. *The London Packet*, 5 Wheat. 132; *The Sally Magee*, 3 Wall. 451; *The Benito Estenger*, 176 U. S. 568.

Further proofs on claimant's behalf were ordered to be furnished within sixty days from June 2; and the time was enlarged to August 31;
p. 662 and again to October 15. The proofs | tendered were three affidavits of claimants' manager sworn to September 27, October 12 and October 21, 1898, respectively, with accompanying papers. Such *ex parte* statements, where further proofs have been ordered, though admitted without objection, are obviously open to criticism, but without pausing to comment on these in that aspect, we inquire whether they satisfy the requirements of the law of prize in respect of the establishment of the neutral character of this cargo under the circumstances.

Gibernau and Company were citizens of a neutral state; they were evidently commission merchants, and in each invoice a charge for their commission on the shipment appears. The invoices expressly provided that the goods were shipped 'to order for account and risk and by order of the parties noted below.' The consignees noted below in the invoice of the jerked beef were the owners of the vessel, 'the expedition or voyage of the "Carlos F. Roses"' and 'Mr. Pedro Pagés of Havana,' all Spanish subjects. The consignees of the garlic were 'Mr. Pedro Pagés' and 'the undersigned;' that is, Gibernau and Company. There were three sets of bills of lading issued by the master to Gibernau and Company. One covered the portion of the shipment of jerked beef made for the account of the vessel; another, the portion of that shipment made for the account of Pagés; the third, the shipment of garlic made for the joint account of Pagés and Gibernau and Company. All the bills set forth that the goods were taken for the account and at the risk of whom it might concern. The ship's manifest was signed under date March 15, and the destination of the cargo was stated thus: 'Shipped by Pla Gibernau Co. To order.' The *visé* of the consul of Spain, dated the day before, was: 'Good for Havana, with a cargo of jerked beef and garlic.' As the vessel had a share in the shipment of the jerked beef, and the consignees were named in the invoices, which set forth that the shipments were made by their orders for their account and at their risk, it would appear that the manifest was erroneous, and this and the fact that the bills of lading stated that the goods were taken 'for account of whom it may concern,' should be especially noted, since the reasonable inference
p. 663 is | that the consignees must have been known to the master. And it also should be observed that there was no charter party, which would have necessarily revealed the engagements of the vessel, but which naturally would not be entered into if the commercial venture was that

of her owner. The general rule is that a consignor on delivering goods ordered, to a master of a ship, delivers them to him as the agent of the consignee so that the property in them is vested in the latter from the moment of such delivery, though the rule may be departed from by agreement or by a particular trade custom, whereby the goods are shipped as belonging to the consignor and on his account and risk. We think that on the face of the papers it must be concluded that when these goods were delivered to the vessel they became the property of the consignees named in the invoices. Hence the shipments of jerked beef must be regarded as owned by Pagés, or by him and the owners of the Carlos F. Roses. One half of the garlic belonged to Pagés, the remaining half was consigned to Gibernau and Company, and they did not claim, and have not claimed it, nor was it asserted that Gibernau and Company retained the ownership of any part of the cargo after its delivery to the vessel. Property so long unclaimed may be treated as in any view good prize. *The Adeline*, 9 Cranch, 244; *The Harrison*, 1 Wheat. 298. In fact, claimants admit that the whole cargo 'was ultimately destined for Don Pedro Pagés of Havana.' The bill of exchange drawn by Gibernau and Company named Kleinwort Sons and Company as acceptors, and directed them to charge the amount to the account of 'Pedro Pagés of Havana as per advice.' The bill drawn by Maristany also named Kleinwort Sons and Company as drawees, and directed them to charge the amount 'to P. Roses Valenti of Barcelona as per advice.' In neither of them was there any reference to the cargo, and, so far as appeared, the amounts were at once charged up to the persons named.

Harcke said that when the bills of exchange were accepted by Kleinwort Sons and Company bills of lading covering the shipment of 110,256 kilos of jerked beef and of the garlic were delivered to them in consideration of the acceptance of the | draft for £2714 13 8, and that bills of lading p. 664
for the 165,354 kilos of jerked beef were afterwards delivered in consideration of the acceptance of the draft for £3583 11 6. But the date of the latter delivery was not given, and it affirmatively appeared that whenever these bills of lading reached Kleinwort Sons and Company they were retained 'pending the disposal of the cargo.' Both drafts were accepted April 6, and the bills of lading for the 110,256 kilos of jerked beef and for the garlic were forwarded to Gelak and Company on April 9, but the bills for the 165,384 kilos of jerked beef, whenever received, never were. The instructions to Gelak and Company were not put in evidence, nor any of the correspondence with Valenti or Pagés. In June, Gelak and Company cabled that the bills sent to them had not been received; in September they turned up, but no information was afforded as to how they came into Gelak and Company's possession; and in October duplicates were also received by claimants from Gelak and

Company, with, so far as disclosed, no accompanying explanation. And Harcke's affidavits failed to set forth the relations, transactions or correspondence existing and passing between claimants and the enemy owners of the cargo. This, although, as Sir William Scott said in *The Magnus*, 1 C. Rob. 31, 'the correspondence of the parties, the orders for purchase, and the mode of payment, would have been the points to which the court would have looked for satisfaction.'

The affidavits alleged that claimants were wholly unindemnified except by the proceeds of the cargo and the insurance thereon, by which the insurers were subrogated to their own rights, but did not state whether the insurance contemplated a war risk, or why the bills of lading for the larger portion of the beef were retained by claimants and not sent to their Havana agents, or whether they retained them upon instructions from the enemy owners; or whether they came to claimants from Spain; nor did anything appear in respect of the interest of Pagés as consignee for himself, or in a representative capacity; nor of Valenti, the owner of the enemy vessel, who resided at Barcelona. The evidence of enemy interest arising on the face of the documents called on the
p. 665 asserted neutral owners to prove | beyond question their right and title. And still for all that appears, the documents may have been sent merely to facilitate delivery to the agent of the enemy owners.

Bills of lading stand as the substitute and representative of the goods described therein, and while *quasi* negotiable instruments, are not negotiable in the full sense in which that term is applied to bills and notes. The transfer of the bill passes to the transferee the transferror's title to the goods described, and the presumption as to ownership arising from the bill may be explained or rebutted by other evidence showing where the real ownership lies. A pledgee to whom a bill of lading is given as security gets the legal title to the goods and the right of possession only if such is the intention of the parties, and that intention is open to explanation. Inquiry into the transaction in which the bill originated is not precluded because it came into the hands of persons who may have innocently paid value for it. *Pollard* v. *Vinton*, 105 U. S. 7; *Shaw* v. *Railroad Company*, 101 U. S. 557.

Generally speaking, in the purchase and shipment of goods on bills of lading attached to bills of exchange drawn against them, the bill of exchange is drawn on the consignee and purchaser, and sent forward for collection through the banker at the place of shipment, who advances on the draft, and thereafter realizes on it through his correspondents, or by sale as exchange; or the banker at some other point, or at the general exchange center, may be the drawee of the bill of exchange instead of the consignee or real owner, the banker standing in the place of the owner, in virtue of some arrangement with his customer, or on

the faith of a running account, the pledge of other securities, or the customer's personal liability, so that the draft may be charged up at once, and, at all events, the control of the goods is not the sole reliance of the banker.

In the case in hand, the captors succeeded to the enemy owners' rights, and could have introduced evidence as to the real nature of the transactions, and so have rebutted any presumption in favor of the bankers as purchasers for value, and although they did not do this, the question still remains that in prize courts it is necessary for claimants to show the absence of anything | to impeach the transaction, and at p. 666
least to disclose fully all the surrounding circumstances. And this we think claimants have failed to do.

The right of capture acts on the proprietary interest of the thing captured at the time of the capture and is not affected by the secret liens or private engagements of the parties. Hence the prize courts have rejected in its favor the lien of bottomry bonds, of mortgages, for supplies, and of bills of lading. The assignment of bills of lading transfers the *jus ad rem*, but not necessarily the *jus in rem*. The *jus in re* or *in rem* implies the absolute dominion,—the ownership independently of any particular relation with another person. The *jus ad rem* has for its foundation an obligation incurred by another. Sand. Inst. Just. Introd., xlviii; 2 Marcadé, Expl. du Code Napoléon, 350; 2 Bouvier, (Rawle's Revision,) 73; *The Young Mechanic*, 2 Curtis, 404.

Claimants did not obtain the *jus in rem*, and, according to the great weight of authority, the right of capture was superior.

In *The Frances*, 8 Cranch, 418, a New York merchant claimed two shipments of goods, one in consequence of an advance made to enemy shippers by him in consideration of the consignment, and the other in virtue of a general balance of account due to him from the shippers as their factor. Both consignments were at the risk of the enemy shippers. The goods were condemned as enemy property, and the sentence was affirmed. This court said:

'The doctrine of liens seems to depend chiefly upon the rules of jurisprudence established in different countries. There is no doubt but that, agreeably to the principles of the common law of England, a factor has a lien upon the goods of his principal in his possession, for the balance of account due to him; and so has a consignee for advances made by him to the consignor. . . . But this doctrine is unknown in prize courts, unless in very peculiar cases, where the lien is imposed by a general law of the mercantile world, independent of any contract between the parties. Such is the case of freight upon enemies' goods seized in the vessel of a friend, which is always decreed to the owner of the vessel. . . .
But in cases of liens created by | the mere private contract of individuals, p. 667

depending upon the different laws of different countries, the difficulties which an examination of such claims would impose upon the captors, and even upon the prize courts, in deciding upon them, and the door which such a doctrine would open to collusion between the enemy owners of the property and neutral claimants, have excluded such cases from the consideration of those courts. . . . The principal strength of the argument in favor of the claimant in this case, seemed to be rested upon the position, that the consignor in this case could not have countermanded the consignment after delivery of the goods to the master of the vessel; and hence it was inferred that the captor had no right to intercept the passage of the property to the consignee. This doctrine would be well founded, if the goods had been sent to the claimant upon his account and risk, except in the case of insolvency. But when goods are sent upon the account and risk of the shipper, the delivery to the master is a delivery to him as agent of the shipper, not of the consignee; and it is competent to the consignor, at any time before actual delivery to the consignee, to countermand it, and thus to prevent his lien from attaching. Upon the whole, the court is of opinion that, upon the reason of the case, as well as upon authority, this claim cannot be supported, and that the sentence of the court below must be affirmed with costs.'

In *The Mary and Susan*, 1 Wheat. 25, an American merchantman bound from Liverpool to New York was captured by a privateer of the United States during the war of 1812. In her cargo were certain goods which had been shipped by British subjects to citizens of the United States, in pursuance of orders received before the declaration of war. Previous to the execution of the orders the shippers became embarrassed, and assigned the goods to certain bankers to secure advances made by them, with a request to the consignees to remit the amount to the bankers, who also repeated the same request, the invoices being for gain and risk of the consignees, and stating the goods to be then the property of the bankers, and it was held that the goods having been purchased and shipped in pursuance of orders from the consignees, the
p. 668 property was originally vested in them, | and was not devested by the intermediate assignment, which was merely intended to transfer the right to the debt due from the consignees.

In *The Hampton*, 5 Wall. 372, the schooner Hampton and her cargo had been captured, libelled and condemned as prize of war. The master of the vessel was her owner, but interposed no claim; nor did any one claim the cargo. One Brinckley appeared and claimed the vessel as mortgagee. The *bona fides* of this mortgage was not disputed; nor that he was a loyal citizen. But his claim was dismissed, and, the case having been certified to this court, it was held that in proceedings in prize, and under the principles of international law, mortgages on vessels captured

jure belli are to be treated only as liens subject to be overriden by the capture. Mr. Justice Miller said :

' The ground on which appellant relies is, that the mortgage, being a *jus in re* held by an innocent party, is something more than a mere lien, and is protected by the law of nations. The mortgagee was not in possession in this case, and the real owner who was in possession admits that his vessel was *in delicto* by failing to set up any claim for her. It would require pretty strong authority to induce us to import into the prize courts the strict common law doctrine, which is sometimes applied to the relation of a mortgagee to the property mortgaged. It is certainly much more in accordance with the liberal principles which govern admiralty courts to treat mortgages as equity courts treat them, as a mere security for the debt for which they are given, and therefore no more than a lien on the property conveyed. But it is unnecessary to examine this question minutely, because an obvious principle of necessity must forbid a prize court from recognizing the doctrine here contended for. If it were once admitted in these courts, there would be an end of all prize condemnation. As soon as a war was threatened, the owners of vessels and cargoes which might be so situated as to be subject to capture, would only have to raise a sufficient sum of money on them, by *bona fide* mortgages, to indemnify them in case of such capture. If the vessel or cargo was seized, the owner need not appear, because he would be indifferent, having the value of his property in his | hands p. 669 already. The mortgagee having an honest mortgage which he could establish in a court of prize, would either have the property restored to him or get the amount of the mortgage out of the proceeds of the sale. The only risk run by enemy vessels or cargoes on the high seas, or by neutrals engaged in an effort to break the blockade, would be the costs and expenses of capture and condemnation, a risk too unimportant to be of any value to a belligerent in reducing his opponent to terms. The principle which thus abolishes the entire value of prize capture on the high seas, and deprives blockades of all danger to parties disposed to break them, cannot be recognized as a rule of prize courts.'

In *The Battle*, 6 Wall. 498, the steamer Battle and cargo were captured on the high seas as prize of war, brought into port and condemned, for breach of blockade and also as enemy property. Two claims were set up against the steamer in the court below, one for supplies, and another for materials, furnished, and for work and labor in building a cabin on the boat. These claims were dismissed, and the decree affirmed by this court, Mr. Justice Nelson delivering the opinion, saying : ' The principle is too well settled that capture as prize of war, *jure belli*, overrides all previous liens, to require examination.'

Such is the rule in the British prize courts. *The Tobago*, 5 C. Rob. 218; *The Marianna*, 6 C. Rob. 24; *The Ida*, Spinks' Prize Cases, 26.

The Tobago was a case of claim to a captured French vessel, made on behalf of a British merchant as the holder of a bottomry bond executed and delivered to him by the master of the ship before the commencement of hostilities between Great Britain and France. Sir William Scott said:

'The integrity of this transaction is not impeached, but I am called upon to consider whether the court can, consistently with the principles of law that govern its practice, afford relief. It is the case of a bottomry bond, given fairly in times of peace, without any view of infringing the rights of war, to relieve a ship in distress. . . . But can the court recognize bonds of this kind as titles of property, so as to give persons a right to
p. 670 stand in judgment, and demand restitution of such interests in | a court of prize? . . . The person advancing money on bonds of this nature, acquires, by that act, no property in the vessel; he acquires the *jus in rem*, but not the *jus in re*, until it has been converted and appropriated by the final process of a court of justice. . . . But it is said that the captor takes *cum onere*, and, therefore, that this obligation would devolve upon him. That he is held to take *cum onere* is undoubtedly true, as a rule which is to be understood to apply where the onus is immediately and visibly incumbent upon it. A captor who takes the cargo of an enemy on board the ship of a friend, takes it liable to the freight due to the owner of the ship; because the owner of the ship has the cargo in his possession, subject to that demand by the general law, independent of all contract. . . . But it is a proposition of a much wider extent, which affirms that a mere right of action is entitled to the same favorable consideration in its transfer from a neutral to a captor. It is very obvious that claims of such a nature may be so framed as that no powers belonging to this court can enable it to examine them with effect. They are private contracts, passing between parties who may have an interest in colluding; the captor has no access whatever to the original private understanding of the parties in forming such contracts; and it is, therefore, unfit that he should be affected by them. His rights of capture act upon the property, without regard to secret liens possessed by third parties. . . . I am of opinion that there is no instance in which the court has recognized bonds of this kind as titles of property, and that they are not entitled to be recognized as such in the prize courts.'

In *The Marianna*, the vessel had been sold at Buenos Ayres by American owners to a Spanish merchant; the purchase money, however, had not been paid in full, but was to be satisfied out of the proceeds of a quantity of tallow on board the vessel for sale, consigned to the agents of the American vendors at London. The vessel was seized on her voyage to England, documented as belonging to a Spanish merchant, and sailing

under the flag and pass of Spain. The former American proprietors made claim to the cargo, but the claim was | disallowed because the p. 671
claimants' interest was not sufficient to support it ; and the court said :

'Captors are supposed to lay their hands on the gross tangible property, on which there may be many just claims outstanding, between other parties, which can have no operation as to them. If such a rule did not exist, it would be quite impossible for captors to know upon what grounds they were proceeding to make any seizure. The fairest and most credible documents, declaring the property to belong to the enemy, would only serve to mislead them, if such documents were liable to be overruled by liens which could not in any manner come to their knowledge. It would be equally impossible for the court, which has to decide upon the question of property, to admit such considerations. The doctrine of liens depends very much on the particular rules of jurisprudence which prevail in different countries. To decide judicially on such claims, would require of the court a perfect knowledge of the law of covenant, and the application of that law in all countries, under all the diversities in which that law exists. From necessity, therefore, the court would be obliged to shut the door against such discussions and to decide on the simple title of property, with scarcely any exceptions. . . . As to the title of property in the goods, which are said to have been going as the funds out of which the payment for the ship was to have been made. That they were going for the payment of a debt will not alter the property ; there must be something more. Even if bills of lading are delivered, that circumstance will not be sufficient, unless accompanied with an understanding that he who holds the bill of lading is to bear the risk of the goods as to the voyage, and as to the market to which they are consigned ; otherwise, though the security may avail *pro tanto*, it cannot be held to work any change in the property.'

These cases were cited by Dr. Lushington in *The Ida* as settling the law. In that case, claim was made by a neutral merchant to a cargo of coffee which had been consigned to him by an enemy on the credit of certain advances, as security for payment of which bills of lading covering the cargo had been delivered to him. But the court declined to recognize the lien, | and condemned the cargo as enemy property. Dr. Lushington p. 672
referred to *The San Jose Indiano and Cargo*, 2 Gallison, 267, and subscribed to what was there said by Mr. Justice Story, but thought his remarks inapplicable to the case in hand.

The case referred to was affirmed by this court. 1 Wheat. 208. Goods were shipped by Dyson, Brothers and Company of Liverpool on board a neutral ship bound to Rio de Janeiro, which was captured and brought into the United States for adjudication. The invoice was headed : 'Consigned to Messrs. Dyson, Brothers, and Finnie, by order

and for account of J. Lizaur.' In a letter accompanying the bill of lading and invoice, Dyson, Brothers and Company wrote Dyson, Brothers, and Finnie: 'For Mr. Lizaur we open an account in our books here, and debit him, etc. We cannot yet ascertain the proceeds of his hides, etc., but find his order for goods will far exceed the amount of these shipments, therefore we consign the whole to you, that you may come to a proper understanding with him.' The two houses consisted of the same persons. It was held that the goods were, during their transit, the property and at the risk of the enemy shippers, and therefore subject to condemnation. Lizaur's claim was rejected although Dyson, Brothers and Company had the proceeds of his hides in their hands.

The Lynchburg, Blatchford's Prize Cases, 57, and *The Amy Warwick*, 2 Sprague, 150, are cited on behalf of claimants, but, as we read them, they do not sustain their contention. The schooner Lynchburg with a cargo of coffee had been libelled during the civil war as enemy property, and also for an attempt to violate blockade. Brown Brothers and Company, loyal citizens, intervened as claimants of 2045 bags of coffee, part of the cargo. They alleged that they had made an advance of credit to Maxwell, Wright and Company, neutral merchants of Rio de Janeiro, for the purchase of the coffee, under which credit Maxwell, Wright and Company drew drafts on Brown Brothers and Company for £6000, on the condition expressed therein that the coffee purchased by claimants should be held until their advances were reimbursed thereon. It was admitted by the United States attorney that 1541 bags of the coffee | p. 673 should be released to Brown Brothers and Company, and that was done. As to the remaining 504 bags embraced in the general claim of Brown Brothers and Company, in which Wortham and Company of Virginia, asserted an interest, it was held by the court that as no proof was given by claimants that the value of the 1541 bags restored to them was not equivalent to the sum of their advances used in purchasing the whole 2045 bags, the reasonable presumption was that the restoration satisfied the entire advance. And Judge Betts said: 'The claim to an absolute ownership of the 2045 bags was placed before the court in the oral argument, and in the written points filed in the cause by the counsel for the claimants, upon the proposition of law, that a bill of lading, transmitted to them by the shipper to cover advances, passed to them the title to the cargo purchased therewith. If this doctrine be correct as to mere commercial transactions, it does not prevail in prize courts, in derogation of the rights of captors, when the interest of the claimants is only a debt, although supported by liens equitable and tacit, or legal and positive, even of the character of bottomry bonds, when not signified on the ship's papers at the time of her capture. *The Frances*, 8 Cranch, 418; *The Tobago*, 5 C. Rob. 218; *The Marianna*, 6 C. Rob. 24. Here, the

vessel was an enemy bottom ; the bill of lading consigned the cargo to order or assigns, at large, at an enemy's port, and, on the surrender of the principal portion of the consignment to the claimants, no other evidence was given in establishing the facts that the remainder of the shipment was owned by them, or yet stood under hypothecation to them on the bill of lading.' The 504 bags were condemned, ' because, by intendment of law, that portion belonged to Wortham and Company, and was not shown by the proofs to be exempt from capture as prize.'

In *The Amy Warwick*, J. L. Phipps and Company of New York, British subjects, purchased 4700 bags of coffee, part of the cargo of an enemy vessel, which they had purchased through Phipps Brothers and Co., their firm at Rio, with funds of an enemy firm, and £2000 of their own money by draft on Phipps and Co., their firm at Liverpool. They took from the master | a bill of lading which stated that Phipps Brothers p. 674
and Company were the shippers of this coffee, and that it was to be delivered to their order. Indorsed on the bill of lading was a statement declaring that a portion of the coffee was the property of British subjects. Phipps Brothers and Company indorsed the bill of lading over to J. L. Phipps and Co. They also delivered to the master another part of the bill of lading, an invoice of the coffee, and a letter of advice to be conveyed to the firm in New York. This letter stated that the coffee was shipped for account of merchants at Richmond, Virginia, and that a bill of lading would have been sent to them had it not been deemed advisable by reason of the unsettled state of political affairs, for the better protection of the property, and to prevent privateers from molesting the vessel, to have it certified on the bill of lading that a portion of the coffee was British property, and that this referred to the portion against which they had valued on Liverpool. It was held that the facts led plainly to the conclusion that claimants ought to be repaid the amount they had expended from their own funds in the purchase of the coffee and that the residue of the proceeds should be condemned. It was said that as the coffee was purchased at Rio by the claimants, and shipped by them on board the vessel under a bill of lading by which the master was bound to deliver it to their order, and they ordered it to be delivered to J. L. Phipps and Co., that is, to themselves, they were the legal owners of the property, and could hardly be said to have a lien upon it. Their real character was that of trustees holding the legal title and possession with a right of retention until their advances should be paid. The doctrine of liens was considered, and *The Frances, The Tobago, The Marianna* and other cases examined. Judge Sprague was of opinion that the rule in such cases ought not to be that which stops at the mere legal title, but that which ascertains and deals with the real beneficial interest, ' for, if the court were never to look beyond the legal title, the result would be that when such title is held

by an enemy in trust for a neutral, the latter loses his whole property; but, when the legal title is in a neutral in trust for an enemy, the property
p. 675 is restored to the neutral, not for his benefit, but | merely as a conduit through which it is to be conveyed to the enemy. To refuse to look beyond the legal title is to close our eyes for the benefit of the enemy. It would enable him always to protect his property by simply putting it in the name of a neutral trustee.'

We agree with counsel for the United States that notwithstanding the indorsement of Gibernau and Company on the bills of lading, the proof of a neutral title was not sufficient. Even if when the neutral interest is adequately proven to be *bona fide*, the claim of the captors may be required to yield, yet in this case the belligerent right overrides the neutral claim, which must be regarded merely as a debt, and the assignment as a cover to an enemy interest.

Something was said in argument in relation to the character of the cargo. It is true that by the modern law of nations, provisions, while not generally deemed contraband, may become so, although belonging to a neutral, on account of the particular situation of the war, or on account of their destination, as, if destined for military use, for the army or navy of the enemy, or ports of naval or military equipment. *The Benito Estenger*, 176 U. S. 568; *The Panama*, 176 U. S. 535; *The Peterhoff*, 5 Wall. 28; Grotius De Jure Belli et Pacis, lib. III, c. 1, § 5; Hall, § 236.

Doubtless, in this instance, the concentration and accumulation of provisions at Havana might fairly be considered a necessary part of Spanish military operations, *imminente bello*, and these particular provisions were perhaps especially appropriate for Spanish military use; but while these features may well enough be adverted to in connection with all the other facts and circumstances, we do not place our decision upon them.

We are of opinion that a valid transfer of title to this enemy property to claimants was not satisfactorily made out, and that

The decree below must be reversed, and a decree of condemnation directed to be entered, and it is so ordered. |

p. 676 Mr. Justice Shiras, with whom concurred Mr. Justice Brewer, dissenting.

This is an appeal from a decree of the District Court of the United States for the Southern District of Florida, awarding to Kleinwort Sons & Company, the claimants, the proceeds of the sale of the cargo of the Spanish bark Carlos F. Roses.

The vessel sailed under the Spanish flag, and was owned, officered and manned by Spaniards. On or about March 14, 1898, Pla Gibernau & Company, a firm of commission merchants doing business at Montevideo in the Republic of Uruguay, shipped on board the bark, then lying at

Montevideo, a cargo consisting of about 275,000 kilos of jerked beef and 20,000 strings of garlic. The property was consigned upon three bills of lading to the order of the shippers ; and two bills of exchange, at ninety days, were drawn upon the claimants, Kleinwort Sons and Company, British subjects, domiciled and doing business as bankers at London, England. One of these bills, for £2714 3 8, was drawn by Pla Gibernau & Company to the order of the London and River Plate Bank, Limited, a banking concern doing business in Montevideo ; the other, for £3583 11 6, was drawn by the master of the Carlos F. Roses to the order of Pla Gibernau & Company, and was by them indorsed to the order of the London and River Plate Bank, Limited.

The bills of exchange and the bills of lading came that day, March 15, 1898, into the possession of the London and River Plate Bank, which cashed the drafts, and forwarded them for acceptance to Kleinwort Sons & Company at London, who accepted them on April 6, 1898, and paid them when due. At the time these bills of exchange were accepted the bills of lading, indorsed by Pla Gibernau & Company, came into the possession of the claimants.

The vessel sailed from Montevideo for Havana on March 16, 1898. On April 25, 1898, war between Spain and the United States was declared, and on May 17, when in the Bahama Channel, on her course to Havana, the Carlos F. Roses was captured by a war vessel of the United States, and sent in charge of a prize crew to Key West. |

On June 2, 1898, the District Court condemned the vessel as enemy's p. 677
property, seized upon the high seas. On February 9, 1899, the District Court held that, as it satisfactorily appeared from the proof that both the title and the right of possession to the cargo were in a neutral at the time of the capture, as evidenced by the indorsed bills of lading and the paid bills of exchange presented at the hearing, the claim should be allowed, and it was so ordered. Thereupon the United States took this appeal.

It is admitted that, if the cargo in question belonged to a neutral, and was not contraband of war, it was not liable to confiscation, though found in an enemy's vessel : this upon well-established principles of international law, and as within the President's proclamation of April 26, 1898, expressly declaring that ' neutral goods, not contraband of war, are not liable to confiscation under the enemy's flag.'

It can scarcely be pretended that, in this instance, the cargo consisted of articles contraband of war. They were the ordinary products of the Republic of Uruguay, a country with which the United States were at peace, and were purchased and shipped six weeks before war was declared. Little, if anything, is left for the commerce of neutrals if such goods, shipped in such circumstances, are not within the protection of the President's proclamation.

The question is whether the District Court erred in finding that the goods in question were neutral goods and exempt, as such, from condemnation.

The first contention, on behalf of the United States, is that the affidavits and exhibits relied on by the claimants to prove their title were not competent evidence, and it is urged that the evidence should have been in the form of depositions, taken under a commission, and of documents duly proved.

We think it is a sufficient reply to this objection that the proofs were received and considered by the District Court upon the trial entirely without objection on the part of the United States or the captors; and that the action of the court in receiving the evidence was not among the assignments of error made and filed under the appeal. |

p. 678 ' If evidence in the nature of further proof be introduced, and no formal order or objection appear on the record, it must be presumed to have been done by consent of the parties, and the irregularity is completely waived. In the present case, no exception was taken to the proceedings or evidence in the District Court; and we should not, therefore, incline to reject the further proof, even if we were of opinion that it ought not, in strictness, to have been admitted.' *The Pizarro*, 2 Wheat. 241, per Mr. Justice Story.

Rule 13 of this court is as follows:

' In all cases of equity and admiralty jurisdiction heard in this court, no objection shall hereafter be allowed to be taken to the admissibility of any deposition, deed, grant or other exhibit found in the record as evidence, unless objection was taken thereto in the court below and entered of record; but the same shall otherwise be deemed to have been admitted by consent.'

It is next contended that the claimants' evidence, regarded as a whole, does not support the decree of the court below. It is said that the burden of proof is upon the claimants, and that this burden has not been sustained.

This was not the view of the District Court, which, as we have heretofore stated, held that it appeared satisfactorily from the proof that both the title and right of possession were in a neutral at the time of capture.

What are the matters urged against this finding of the court below?

It is argued that, because it appears in the invoices and in the manifest that the shipments were made partly on account of ' the expedition or voyage of the Carlos F. Roses,' partly on account of ' Mr. Pedro Pagés of Havana,' and partly on account of the shippers, that is, Gibernau & Company, it is a reasonable inference that it must have been known to the master that the consignees were, as to some of the cargo, enemies, and that it must be concluded, on the face of the papers, that when the

goods were delivered to the vessel they became the property of the consignees named in the invoices.

Such a view loses sight of the decisive and indisputable facts that the money used by Gibernau & Company in the purchase | of the goods was p. 679
procured from the London and River Plate Bank, which cashed the drafts drawn on Kleinwort Sons & Company, the claimants, and that when the latter company, on April 6, accepted the drafts they were furnished with the bills of lading covering the entire shipment ; that the said bills of lading, at the time of such delivery, were duly indorsed in blank by Gibernau & Company, the shippers, and to whose order the said cargo was by the terms of the bills of lading to be delivered, all with the intent and result of entitling Kleinwort Sons & Company to the said bills of lading and to the cargo described therein as security for their acceptance of the drafts. It hence was entirely immaterial whether the ultimate consignees were, as to some of the cargo, residents of the enemy's country, and whether that fact was known to the master. Under the facts proved by the claimants the latter, through the London and River Plate Bank, had furnished the money used in the purchase of the goods, before the sailing of the vessel. This is made plainly to appear by the invoices furnished by the shippers, and wherein is stated that the master received the goods from Pla Gibernau & Company, and wherein also there is a statement of the cost of the goods and of the commissions charged by Gibernau & Company, corresponding in amount to the drafts.

The fact that the claimants' proofs do not set forth the correspondence between the claimants and the ultimate consignees is made a matter of unfavorable comment. But the transactions were substantially described in the affidavits, and it is not easy to see what further light would have been afforded by such correspondence, if, indeed, there was such correspondence.

The purchase of the goods, the drawing and cashing of the drafts, the indorsement and delivery of the bills of lading, all took place before the sailing of the vessel, and long before the declaration of war, and before there was any reason to anticipate hostilities. The drafts were accepted before the war, and were paid before the seizure of the vessel.

No counter evidence was offered by the United States, although the case was pending in the District Court from June 6, 1898, to February 9, 1899, when the decree in favor of the claimants was entered. It is, of course, true that the burden | of proof was on the claimants, but when the p. 680
Government elected to stand on the proof adduced by the claimants, every fair and reasonable intendment must be made in favor of that proof. If the case so made out is consistent with the rightfulness of the claim, it should not be defeated by mere suggestions and suppositions, not

founded on evidence. 'All reasonable doubts shall be resolved in favor of the claimants. Any other course would be inconsistent with the high administration of the law and the character of a just government.' *Prize Cases*, 2 Black, 635.

The final contention on behalf of the United States is that, even if the facts of the case were as set forth in the claimants' proofs, and as found by the District Court, yet, as matter of law, the claimants cannot succeed, because 'the right of capture acts on the proprietary interest of the thing captured at the time of the capture, and is not affected by the secret liens or private engagements of the parties; that hence prize courts have rejected in its favor the lien of bottomry bonds, of mortgages, for supplies, and of bills of lading; . . . that claimants did not obtain the *jus in rem*, and, according to the great weight of authority, the right of capture was superior.'

To sustain this proposition the following cases are cited: *The Mary and Susan*, 1 Wheat. 25; *The Frances*, 8 Cranch, 418; *The Sally Magee*, 3 Wall. 451; *The Hampton*, 5 Wall. 372; *The Battle*, 6 Wall. 498; *The Tobago*, 5 C. Rob. 218; *The Marianna*, 6 C. Rob. 24; *The Ida*, 1 Spinks' Prize Cases, 331.

The *Mary and Susan* was a case where an American house had ordered the purchase of goods in England before the declaration of war, and where their English agents had assigned the goods to certain brokers to secure advances made by them. The goods were captured en route to America, and were libelled in the District Court of the District of New York as prize of war. But it was held, both in the Circuit Court and in this court, that the property had vested in the American firm, who were the claimants, before and at the time of shipment, and was not divested by a mere request made by the shippers to the consignees to remit the purchase money to the bankers, although in the invoice it was stated
p. 681 that the goods were the property of the bankers. | The transaction was regarded, not as a transfer of the goods, but as merely intended to transfer the right to the debt due from the consignees. No bills of exchange were drawn on the consignees in favor of the English bankers, nor were any bills of lading indorsed to them. The evidence of the transaction was found only in letters addressed to the consignees by the shippers, requesting them to pay the purchase money to the bankers; and this court held, after a careful examination of the evidence, that there was no intention to secure the bankers by any transfer of the title of the property, but only to secure them by a transfer of the debt due from the consignees.

The case of *The Frances* was an appeal from the sentence of the Circuit Court of Rhode Island, condemning certain British goods, captured on board the Frances, and which were claimed by Thomas Irvin,

a domiciled merchant of the United States, on the ground of lien. It was stated by Mr. Justice Washington that 'it was not pretended that the real ownership in these goods was not vested in the consignors, enemies of the United States; but the claimant founds his pretensions on a lien created on the goods consigned, in consequence of an advance made to the shippers, in consideration of the consignment, by his agent in Glasgow, and also in virtue of a general balance of account due to him as their factor.' And it was held that while, according to the common law, a factor has a lien upon the goods of his principal in his possession, for the balance of account due him, and likewise a consignee for advances made by him to the consignor; yet that this doctrine is unknown in prize courts, unless in very peculiar circumstances. And the court referred to the case of *The Tobago*, 5 C. Rob. 196, where it was held that a lien on a vessel created by a bottomry bond was not protected from capture.

It will be seen that in this case of *The Frances*, as in the case of *The Mary and Susan*, there was no question of the effect of a transfer of title by bills of lading, but a mere assertion of a lien by virtue of common law principles.

The *Sally Magee* is the next case cited. This was the case of an enemy's vessel bound for an enemy's port. A portion of the cargo was claimed by Fry, Price & Company, for Coleman & | Company, a Rio firm, because, as p. 682
was alleged, Coleman & Company, as factors and commission merchants, had been directed to purchase and ship for the account of Davenport & Company, of Richmond, Va., a cargo of coffee, if procurable at not over ten and a half cents per pound; that Coleman & Company did make the shipment of the cargo claimed to the consignment of Davenport & Company, but that by the invoice thereof it appeared that the said purchase was not made at or within the said limit; for which cause Davenport & Company had refused to receive it as purchased for their account, or otherwise than on account of the shippers, Coleman & Company, and as agents of necessity for them; and that Davenport & Company had been authorized to receive it in their place and behalf. Another claim related to the residue of the cargo, also coffee, consigned to Dunlop & Company, of Richmond. It was not denied that this portion of the cargo was enemy's property, but the claimants alleged a lien because of a balance due claimants by Dunlop & Company.

In respect to the first claim, it was held that if Coleman & Company, as factors, bought the coffee at a price exceeding the limit prescribed by Davenport & Company, and the latter, on learning the fact, repudiated the purchase, the title of the factors thereupon became absolute, and none passed to the principals for whom the purchase was made; but that there was an entire failure, on the part of the claimants, to prove the facts as alleged, although more than two years had elapsed between the

filing of the claim and the time when the decree was rendered. Accordingly, the decree of condemnation as to that portion of the cargo was affirmed.

The language of the court in disposing of the second claim was as follows :

' The other claim relates to the coffee consigned to Dunlop & Company, of Richmond, and it is not denied that this was enemy's property. The claimants allege a lien. The claim states that Dunlop & Company owed them a balance of upward of $35,326, and that they were authorized and directed by that firm to receive and sell the coffee, and apply the proceeds,
p. 683 as far as necessary, to the payment of the debt, and to hold the | balance for the debtor firm. The same affiant made the test affidavit, as in the other case. He referred, as in that case, to an important correspondence, and failed to produce it. The same remarks apply to that subject. It is to be inferred, also, that the letters were written after the shipment of the cargo, and, indeed, after the capture. In either case, the arrangement was made too late to have any effect.

' The ownership of property in such cases cannot be changed while it is *in transitu*. The capture clothes the captors with all the rights of the owner which subsisted at the commencement of the voyage, and everything done thereafter, designed to incumber the property or change its ownership, is a nullity. No lien created at any time by the secret contention of the parties is recognized. Sound public policy and the right administration of justice forbid it. This rule is rigidly enforced by all prize tribunals. The property was shipped to the enemy. It was diverted from its course by its capture. The allegation of a lien wears the appearance of an afterthought.'

It will be observed that there was no effort in this case to claim property vested or transferred by bills of lading. Indeed, it appeared that the bills of lading were made out in favor of the consignees at Richmond, and it was said by the court that the legal effect of a bill of lading was to vest the ownership in the consignees, citing *Lawrence* v. *Minturn*, 17 How. 100, in which it was said that ' the general effect of a bill of lading to raise a presumption of property in goods in him to whom it makes them deliverable, is conceded.'

Next comes the cited case of *The Hampton*, libelled and condemned as prize of war in the Supreme Court for the District of Columbia. It was held that mortgages on vessels captured *jure belli* are to be treated only as *liens*, subject to be overridden by the capture, not as *jura in re*, capable of an enforcement superior to the claims of the captor.

Then comes the case of *The Battle*, where there were claimants against the proceeds of sale of an enemy's vessel for supplies furnished and for materials furnished and for work and labor. The claims were dismissed

by the District Court of the United States, and on appeal that decree was affirmed by this court, | which, through Justice Nelson, said : ' The prin- p. 684
ciple is too well settled, that capture as prize of war overrides all previous liens, to require examination,' citing the cases of *The Hampton* and *The Frances*.

These are all the American cases cited, and it is to be observed that, in none of them, was the court called upon to decide the question whether bills of lading made or indorsed to neutrals, before the declaration of war, on account of money furnished to purchase cargoes, are protected as neutral goods from capture, within the general international rule, and the President's proclamation, protecting such goods, when not contraband, from condemnation as prize of war. The doctrine of these cases simply amounts to the proposition, that bottomry bonds, mortgages and private agreements that factor's balances and advances should be preferred claims, are mere *liens*, which create no property rights in vessels or cargoes, superior to the captor's rights.

Let us now examine the English cases cited.

The first is that of *The Tobago*, 5 C. Rob. 218. This was the case of a bottomry bond, and it was held that such a bond confers no property in the vessel ; that the property continues in the former proprietor, who has given a right of action against it, but nothing more. In the case of *The Marianna*, 6 C. Rob. 24, there was a claim against a Spanish vessel, for unpaid purchase money on the vessel which had been sold by an American owner to a Spanish merchant, but which was to be satisfied out of the proceeds of a quantity of tallow consigned to England on board this vessel for sale. Sir William Scott said :

' A claim is given on behalf of the former American proprietor, in virtue of a lien which he is said to have retained on the property for the payment of the purchase money, but such an interest cannot, I conceive, be deemed sufficient to support a claim of property in a court of prize.'

In respect to the goods which were said to have been pledged to secure the payment of the purchase money of the ship, Sir William Scott said :

' Then as to the title of property in the goods which are said to have been going as the funds out of which the payment for | the ship was to have p. 685
been made. That they were going for the payment of a debt will not alter the property ; there must be something more. Even if bills of lading are delivered, that circumstance will not be sufficient, unless accompanied with an understanding that he who holds the bill of lading is to bear the risk of the goods as to the voyage, and as to the market to which they are consigned ; otherwise, though the security may avail *pro tanto*, it cannot be held to work any change in the property.'

It will be noticed that the shipper of the goods in this case was the Spanish merchant, an enemy.

Finally, the case of *The Ida* is relied on. 1 Spinks' Prize Cases, 331. The statement of the case was as follows :

' The claim of neutral merchants for 2650 bags of coffee, consigned to them on the credit of advances made by them was disallowed. The claim is that of *lien*, which cannot be upheld against captors. Further proof cannot be allowed when there has been an attempt to deceive the court by simulated papers.'

In considering the evidence in the case, Dr. Lushington said :

' Now, that simulated bill of lading was certainly framed for some purpose or other by desire of the master. It is a well-known rule of this court that where there are contradictory papers the burden of proof lies on the claimant to show that the contradiction is not inconsistent with the rights of a belligerent power ; and, I must say, I have not heard any satisfactory explanation of how or why these papers were framed, except it was for the purpose of deceiving those who might have to determine whether it was an enemy's property or not.'

In discussing the law of the case, Dr. Lushington said :

' It is contended by counsel that the property is in Behrens & Company by virtue of the endorsement of the bills of lading ; and cases from common law have been cited in support of this. I believe that, in some circumstances, that would be the case. They would have a legal title to the property ; but I have considerable doubt whether it is not the law of this court that the claimant must show that he has not only a legal, but an equitable title. If a mere legal title would justify the court in
p. 686 restoring property the consequences would be most alarming ; | for nothing would be more easy than to cover enemies' property from one end of the kingdom to the other. I strongly object to the doctrine that if a legal title be shown this court is bound to restore ; for I hold that an equitable title is also necessary to support a claim in this court.'

Upon the whole, the learned judge was of the opinion that the property belonged to an enemy, subject to claimant's charges, and that it was not possible to doubt for a single moment that there was an intention in the case, by means of colorable bills of lading, to deceive and defraud Great Britain of its belligerent rights, by attempting to cover enemy's property as neutral.

The case of *The Ida* can therefore be cited as conceding that, if the claimants had vested in them the legal title to the goods by virtue of the indorsement of the bills of lading, and had also an equitable title, they would be entitled to a judgment of restoration. But the court was of opinion that there was no evidence whatever of any portion of the cargo belonging to a neutral. While it was true that the claimants exhibited a bill of lading indorsed to them, yet another bill of lading not indorsed was found on capture in possession of the master. Such a state of facts

justly created a belief that the transaction was essentially fraudulent, as an attempt to cover enemy's property.

We shall now consider some of the cases cited on behalf of the claimants.

The Amy Warwick, 2 Sprague, 150; 2 Black, 635, is, in several respects, a leading case, and is decisive of the present one. It was there held that, where a neutral commission merchant purchased a cargo of coffee for enemy correspondents, partly with their funds and partly with his own, and shipped it under a bill of lading by which it was to be delivered to his order, having a legal title and a beneficial interest, a prize court should award him the amount of his advances, although the residue of the property will be condemned as enemy's.

After a full statement of the facts, the conclusion was thus stated by Judge Sprague:

'The claim of J. L. Phipps & Company was filed on the 4th of September last. It alleges that this coffee was purchased by them partly by funds of Dunlop, Moncure & Company, of Richmond, | and partly by p. 687
£2000 of their own money; that the legal title has always remained in them, and that no other person is the legal owner, except the equitable interest of said Dunlop, Moncure & Company.

'These facts seem plainly to lead to the conclusion that the claimants ought to be repaid the amount which they expended from their own funds in the purchase of the coffee, and that the residue of the proceeds should be condemned. This result I shall adopt, unless precluded from doing so by authority.

'The counsel for the captors contend that the claimants had only a lien, and that liens will not be protected or regarded in a prize court. This position is sustained by the authorities as to certain kinds of liens. The extent of this doctrine and the reasons on which it is founded are stated by the Supreme Court in *The Frances*, 8 Cranch, 418. It is there said that 'cases of liens created by the mere private contract of individuals, depending upon the different laws of different countries, are not allowed, because of the difficulties which would arise in deciding upon them, and the door which would be open to fraud.' Similar reasons are given by Lord Stowell in *The Marianna*, 6 C. Rob. 24, and in several other cases. These reasons are especially applicable to latent liens created under local laws. They do not reach the case now before the court. This coffee was purchased by the claimants at Rio, and shipped by them on board this brig under a bill of lading, by which the master was bound to deliver it to their order, and they ordered it to be delivered to J. L. Phipps & Company, that is, to themselves. They then retained the legal title, and the possession of the master was their possession. Being the legal owners of the property, they can hardly be said to have a lien upon it; a lien being in strictness an incumbrance upon the property of another.

Their real character was that of trustees holding the legal title and possession, with a right of retention until their advances should be paid. . . . The case of *The San Jose Indiano*, 1 Wheat. 208, has been cited by the counsel for the claimants, and they contend that it sustains their whole claim, and requires all the coffee to be restored to them. That case is a stringent authority to the extent of the £2000 which the claimants
p. 688 invested or advanced | in the purchase; but I do not think that it authorizes me to go further.'

This case was taken to the Circuit Court and there affirmed. No appeal was taken to the Supreme Court from that part of the decree which allowed the claim of Phipps & Company. The decree of condemnation of the residue was affirmed. 2 Black, 635.

The bark Winifred was captured in May, 1861, off Cape Henry, and confiscation of vessel and cargo was demanded as being enemy's property. The cargo, consisting of 4200 bags of coffee, had been purchased by Phipps & Company in Rio, as agents for Crenshaw & Company, Richmond merchants. Phipps & Company advanced their own funds to the extent of three eighths of the cargo. The consignment formally was to shipper's order, but the bills of lading were sent forward indorsed to Crenshaw & Company. Subsequently, Phipps & Company made further advances of $20,622 on April 26, while the goods were in transit, and, after the outbreak of hostilities, taking a reassignment of the bills of lading. The District Court ordered a restoration of three eighths of the cargo to Phipps & Company, but refused to allow their claim for the further advances on the other five eighths of the cargo, citing *The Marianna*, 6 C. Rob. 24, and *The Frances*, 8 Cranch, 418. But on appeal the Circuit Court, while affirming the decree allowing the claim against the three eighths of the cargo, reversed that part of the decree which refused the claim for the further advances, allowed further proofs, and in December 1863, allowed the entire claim of Phipps & Company, with interest. *The Winifred*, Blatchford's Prize Cases, page 35, and note.

The Lynchburg was captured with her cargo in May, 1861, at the mouth of Chesapeake Bay. Two thousand and forty-five bags of coffee, part of her cargo, had been purchased by Maxwell, Wright & Company, as agents for Wortham & Company, of Richmond. Maxwell, Wright & Company took bills of lading, consigning the cargo to their own order, and drew against them on Brown, Shipley & Company, of London, for £6090, who accepted the drafts and subsequently paid them. The entire
p. 689 cargo was destined ultimately for enemies. Wortham & | Company, of Richmond, claimed 504 bags of this shipment, subject to the lien of Brown, Shipley & Company. The District Court restored to Brown, Shipley & Company 1541 bags, but condemned the 504 bags claimed by Wortham & Company as enemy's property. Judge Betts said :

'The claim to an absolute ownership of the 2045 bags was placed before the court in the oral argument and in the written points filed in the cause by the counsel for the claimants, upon the proposition of law that a bill of lading, transmitted to them by the shipper to cover advances, passed to them the title to the cargo purchased therewith. If this doctrine be correct as to mere commercial transactions, it does not prevail in prize courts in derogation of the rights of captors, when the interest of the claimant is only a debt, although supported by liens equitable and tacit, or legal and positive, even of the character of bottomry bonds, when not signified on the ship's papers at the time of capture. *The Frances*, 8 Cranch, 418; *The Tobago*, 5 C. Rob. 218; *The Marianna*, 6 C. Rob. 24.'

On appeal the Circuit Court affirmed as to the allowance of the claim of Brown, Shipley & Company for the 1541 bags, but reversed the refusal of their further claim for 504 bags, allowed the claimants to give further proofs, and ultimately the 504 bags were restored by consent to the claimants. *The Lynchburg*, Blatchford's Prize Cases, 51, and note on p. 52.

The exigencies of trade have called a class of instruments into being which are substantially acknowledgments by public or private agents that they have received merchandise, and from whom or on whose account; and usage has made the possession of such documents equivalent to the possession of the property itself. Among them the most notable is the bill of lading, in respect to which, and replying to the question whether at law the property of goods at sea passes by the indorsement of a bill of lading, Buller, J., said, in his opinion in *Lickbarrow* v. *Mason*: 'Every authority which can be adduced, from the earliest period of time down to the present hour, agree that at law the property does pass as absolutely and as effectually as if the goods had been actually delivered into the hands of the consignee.' | Smith's Leading Cases, vol. part 11, p. 690 7th Am. ed. under the head of *Lickbarrow* v. *Mason*.

The conclusion warranted by the cases is that, as well advances made for the purchase of goods, as an absolute purchase, are protected by bills of lading, whether made out directly to the party purchasing or making the advancements, or indorsed to him by the shipper.

While possession of the bills of lading imports a legal title to the goods, yet in prize cases it is permitted for the courts to go behind the bills of lading, if there is evidence tending to show that the party in whose name they are issued, or to whom they have been indorsed, has no equitable interest or is a mere cover to an enemy. In the present case there was no transfer of the property from an enemy to a neutral. Up to the time of shipment the entire cargo was owned by Pla Gibernau & Company. They transferred it to the London and River Plate Bank, Limited, who

in turn transferred it to Kleinwort Sons & Company, who produced the bills of lading at the hearing and moved the payment by them, before the capture of the vessel, of the drafts whose negotiation furnished the moneys used in the purchase of the goods. The entire issue of each set of bills of lading was possessed by Kleinwort Sons & Company, under indorsements which gave to them only the right to demand delivery from the vessel.

The case falls plainly within the law as administered in *The Amy Warwick*, *The Winifred* and *The Lynchburg*.

If the rule asked for by the captors in this case should be upheld, namely, that bills of lading indorsed to neutrals, acting in good faith, who have advanced money to purchase goods shipped long before the declaration of war, do not create a right of property in the goods, there would be very little room left for the operation of the President's proclamation exempting neutral goods from condemnation. Such a rule would be very unfortunate as respects the commerce of the United States in case of hostilities between European countries. Owing to the limited amount of merchant shipping owned in the United States, the greater part of their products, whether breadstuffs or manufactured goods, has
p. 691 to be carried in foreign vessels, and | it is quite evident that bankers and capitalists could not afford to advance the moneys needed to make purchases, if they could not be protected against seizure by foreign belligerents, by the indorsement to them of bills of lading. Only those who actually own the goods could safely ship them on vessels owned by belligerents, and, what constitutes the larger part of international trade, the purchase and shipment of merchandise by factors with moneys advanced by banking houses would, in case of war, have to cease. The decree of the District Court should be affirmed.

The Manila Prize Cases.[1]

(188 U.S. Reports, 254) 1903.

APPEALS FROM THE SUPREME COURT OF THE DISTRICT OF COLUMBIA.

Nos. 309, 310, 311. Argued October 28, 29, 1902—Decided January 23, 1903.

While the right of the citizen to demand condemnation of vessels or property as prize for his benefit must be derived from acts of Congress, and their scope is not to be enlarged in his favor by construction, where there is no controversy in respect to the existence of the grant, a more liberal construction may be applied in carrying the intention of Congress into effect.

1. Vessels lying on the bottom in shallow water in such condition, as the result of a naval engagement, that they cannot be floated by any of the means possessed by the naval force overcoming them, but which are afterwards, by the inde-

[1] Docket titles—*United States* v. *Dewey*, No. 309. *Dewey* v. *United States*, No. 310. *Stovell* v. *Dewey*, No. 311.

pendent means of the Government, raised and repaired and appropriated to its own use are not to be regarded as sunk or destroyed within the meaning of sec. 4635, Rev. Stat., but they may be regarded as within the provisions of secs. 4624 and 4625, and their money value may stand in place of prize and be so adjudicated.

2. The legal status of property taken from vessels in such condition must be regarded as the same as the vessel to which it belongs.

3. Naval stores—public enemy property—designed for hostile uses, stored on the sea shore in an establishment for facilitating naval warfare, when taken by a naval force, as a result of a naval engagement, can be adjudged as prize for the benefit of the captors.

As the right of the government of the capturing naval force is supreme, it may when in its judgment the public interest demands it, restore a prize; and the courts cannot proceed to condemnation as to captured property restored under a treaty of peace before decree.

The strength of the capturing naval force under Admiral Dewey's command at Manila was superior to that of the Spanish fleet on May 1, 1898.

4. Cascoes, or native boats, and certain floating derricks, property of private persons in the Philippine Islands, were rightly held by the District Court not to be subject to condemnation as prize.

5. Vessels performing the functions of colliers and not in a condition to render effective aid, if required, during a naval engagement and the masters and crews thereof who have been shipped, but who are not commissioned or enlisted men in the United States Navy, are not entitled to participate in prize money or bounty resulting from the capture and destruction of the enemy's vessels. |

THESE are appeals taken from a decree of the Supreme Court of the p. 255
District of Columbia, sitting as a District Court of the United States in admiralty, in a suit in prize brought by Admiral Dewey in behalf of himself and the officers and crew of the naval forces on the Asiatic station, taking part in the battle of Manila Bay.

May 1, 1898, Admiral Dewey, being then a Commodore in the United States Navy, with a fleet under his command, engaged a Spanish fleet consisting of the Reina Cristina, Castilla, Don Juan de Austria, Don Antonio de Ulloa, General Lezo, Marques del Duero, Argos, Velasco, Isla de Cuba, Isla de Luzon, Isla de Mindanao, Manila and two torpedo boats, supported by shore batteries, submarine mines and torpedoes. At the close of the battle all these vessels were confessedly destroyed except the Manila, which was captured, and the Don Juan de Austria, Isla de Cuba and Isla de Luzon, in respect of which the facts were these: Under the severe fire of the American fleet they steamed to a position of greater safety, and, after the battle, backed ashore, and when in shallow water their sea valves were opened and they settled on the bottom. They, and other armed vessels, were afterwards set on fire by a detachment from the United States fleet, in obedience to a signal from the flagship when the firing ceased. All captured vessels, not destroyed, were appraised and appropriated to the use of the United States, except one or more private vessels, which were restored to their

owners, and not including the Don Juan de Austria, the Isla de Cuba and the Isla de Luzon.

May 3, 1898, Commodore Dewey took possession of the Cavite arsenal, containing a large quantity of naval stores and supplies, and some boats, and he also took possession of certain land batteries. Some of the property taken at the arsenal, besides that taken from the sunken vessels, was included in the appraisement.

The protocol between the United States and Spain, signed August 12, 1898, provided as follows: 'The United States will occupy and hold the city, bay and harbor of Manila, pending the conclusion of a treaty of peace, which shall determine the control, disposition and government
p. 256 of the Philippines. | . . . Upon the conclusion and signing of this protocol, hostilities between the two countries shall be suspended.'

About the first of September, 1898, an examination was made of the Don Juan de Austria, the Isla de Cuba and the Isla de Luzon, and the commander-in-chief advertised for bids for raising, repairing and fitting them out. In October he contracted, on behalf of the United States, with a dock company to effect this purpose. The work of raising the vessels was begun on October 29 and finished on November 24. They were then overhauled sufficiently to enable them to proceed to Hong Kong, where they were reconstructed and refitted for use in the United States Navy, of which they became a part.

Full report was made to the Navy Department in July, 1899, of the condition of each of these vessels, upon being raised, and of the progress of reconstruction, including estimates of the value of the vessels when completed, exclusive of armament, and of the cost of raising, fitting out and repairing them. And an appraisement was made in that department of the three vessels when completed, giving the value, and the cost of repairs, from which it also appears that they were first commissioned in the United States Navy in 1900.

Some of the other sunken vessels might probably have been raised to advantage, but no attempt was made to do so, though a small amount of property was taken from them for government use. They were all advertised for sale in September, 1898, but no bids were received.

Shortly after the battle, the commander-in-chief took possession for government use of some cascoes or cargo boats, and two floating derricks belonging to private parties.

The treaty of peace between the United States and Spain provided: 'Stands of colors, uncaptured war vessels, small arms, guns of all calibres, with their carriages and accessories, powder, ammunition, live stock, and materials and supplies of all kinds, belonging to the land and naval forces of Spain in the Philippines and Guam, remain the property of Spain.'

By virtue of this provision, so much of the public property captured at the Cavite arsenal, and elsewhere on land, remaining unused at the date of the exchange of ratifications, was subsequently restored to Spain. |

Actions were instituted for bounty under section 4635 of the Revised p. 257
Statutes, on account of all the vessels other than the Don Juan de Austria, the Isla de Cuba, the Isla de Luzon and those enumerated in the appraisement, and bounty has been granted under that section for the destruction of those vessels. *Dewey* v. *United States*, 35 C. Cl. 172 ; *S. C.*, 178 U. S. 510.

July 20, 1899, this libel was filed against the Don Juan de Austria, the Isla de Cuba, the Isla de Luzon ; all the property taken from them and from the sunken vessels ; all the vessels and other property taken afloat, and all the property captured ashore.

The United States filed an answer denying that the Don Juan de Austria, the Isla de Cuba and the Isla de Luzon, the property captured on board of them, the property captured on land, and the cargo boats were subject to condemnation as prize. March 26, 1901, an intervening libel was filed by Edwin F. Stovell, on behalf of himself and the officers and crew of the Nanshan, to which an answer was filed by libellant. The case having been heard, a decree of condemnation and distribution was made November 5, 1901, which adjudged the Isla de Cuba, the Isla de Luzon and the Don Juan de Austria, and the Manila and all other captured vessels named in the appraisement, except such as might have been returned to private owners, and all property captured upon or belonging to any of these vessels, or any vessels sunk or destroyed on May 1, 1898, to be lawful prize of war. All property captured ashore and all non-seagoing craft belonging to the arsenal, as well as all cascoes and the floating derricks not belonging to the King of Spain, were held not to be prize, and as to such property the libel was dismissed. The Nanshan, and the Zafiro, a vessel in the same situation, were held not entitled to share in any of the prize property ; and the hostile fleet was held to have been of inferior force to the vessels making the capture. An appeal was taken by the United States, a cross appeal by libellant, and an appeal by the intervenor.

Errors were assigned :

By the United States, that the District Court erred in holding (1) p. 258
that the vessels of war raised and reconstructed for the | navy, with guns, munitions, equipment, stores and other articles found upon them, were lawful prize of war for the benefit of the captors ; (2) as also guns, munitions, equipment, stores and other articles on board the Spanish vessels of war sunk or otherwise destroyed, and not restored.

By libellant, that the District Court erred in holding (1) that the

property captured at the naval station at Cavite was not lawful prize; (2) that the cascoes were not lawful prize.

By the intervenor, in holding that the Nanshan (and with her the Zafiro) was not entitled to share in the prize property.

Mr. Assistant Attorney General Hoyt and *Mr. Special Attorney Charles C. Binney* for the United States.

Mr. Benjamin Micou for Admiral Dewey and other officers. *Mr. Hilary A. Herbert* was with him on the brief.

Mr. William B. King for Rear Admiral Coghlan and others. *Mr. George A. King* was with him on the brief.

Mr. Charles W. Claggett and *Mr. Conrad H. Syme* for appellant Stovell.

Mr. Chief Justice Fuller, after making the foregoing statement, delivered the opinion of the court.

Captures in war enure to the Government and can become private property only by its grant. The right of the citizen to demand condemnation of vessels or property as prize for his benefit must be derived from acts of Congress, and their scope is not to be enlarged in his favor by construction. *The Siren*, 13 Wall. 389. Although in matters of detail, where there is no controversy in respect of the existence of the grant, a more liberal construction may be applied in carrying the intention of Congress into effect.

The correctness of the decree so far as it related to Spanish seagoing
p. 259 vessels with their equipment and the property found | on board of them, captured at the battle or soon afterward, and not restored to their owners, is conceded.

1. The first question to be determined is whether the Don Juan de Austria, the Isla de Cuba, and the Isla de Luzon were properly adjudicated as prize for the benefit of captors in view of their condition immediately after the engagement, and their being subsequently raised, reconstructed, and commissioned in the Navy.

In the consideration of that question we assume that 'capture' and 'prize' are not convertible terms, and that for the subject of capture to be made prize for the benefit of the captors the taking must meet the conditions imposed by the statutes.

The statutory provisions bearing on the case are to be found in chapter LIV of the Revised Statutes, entitled 'Prize,' embracing sections 4613 to 4652 inclusive, some of which are given below, together with certain of the 'Instructions to Blockading Vessels and Cruisers,' issued by General Order, June 20, 1898.[1] |

[1] 'Sec. 4613. The provisions of this title shall apply to all captures made as prize by authority of the United States, or adopted and ratified by the President of the United States.'

'Sec. 4615. The commanding officer of any vessel making a capture shall

Ordinarily the property must be brought in for adjudication, as the question is one of title, which does not vest until condemnation, but it p. 260

secure the documents of the ship and cargo, including the log book, with all other documents, letters, and other papers found on board, and make an inventory of the same, and seal them up, and send them, with the inventory, to the court in which proceedings are to be had, with a written statement that they are all the papers found, and are in the condition in which they were found; or explaining the absence of any documents or papers, or any change in their condition. He shall also send to such court, as witnesses, the master, one or more of the other officers, the supercargo, purser, or agent of the prize, and any person found on board whom he may suppose to be interested in, or to have knowledge respecting, the title, national character, or destination of the prize. He shall send the prize, with the documents, papers, and witnesses, under charge of a competent prize master and prize crew, into port for adjudication, explaining the absence of any usual witnesses; and in the absence of instructions from superior authority as to the port to which it shall be sent, he shall select such port as he shall deem most convenient, in view of the interest of probable claimants, as well as of the captors. If the captured vessel, or any part of the captured property, is not in condition to be sent in for adjudication, a survey shall be had thereon and an appraisement made by persons as competent and impartial as can be obtained, and their reports shall be sent to the court in which proceedings are to be had; and such property, unless appropriated for the use of the Government, shall be sold by the authority of the commanding officer present, and the proceeds deposited with the Assistant Treasurer of the United States most accessible to such court, and subject to its order in the cause.'

'SEC. 4624. Whenever any captured vessel, arms, munitions, or other material are taken for the use of the United States before it comes into the custody of the prize court, it shall be surveyed, appraised, and inventoried, by persons as competent and impartial as can be obtained, and the survey, appraisement, and inventory shall be sent to the court in which proceedings are to be had; and if taken afterward, sufficient notice shall first be given to enable the court to have the property appraised for the protection of the rights of the claimants and captors. In all cases of prize property taken for or appropriated to the use of the Government, the department for whose use it is taken or appropriated shall deposit the value thereof with the Assistant Treasurer of the United States nearest to the place of the session of the court, subject to the order of the court in the cause.

'SEC. 4625. If by reason of the condition of the captured property, or if because the whole has been appropriated to the use of the United States, no part of it has been or can be sent in for adjudication, or if the property has been entirely lost or destroyed, proceedings for adjudication may be commenced in any district the Secretary of the Navy may designate; and in any such case the proceeds of anything sold, or the value of anything taken or appropriated for the use of the United States, shall be deposited with the Assistant Treasurer in or nearest to that district, subject to the order of the court in the cause. If, when no property can be sent in for adjudication, the Secretary of the Navy shall not, within three months after any capture, designate a district for the institution of proceedings, the captors may institute proceedings for adjudication in any district. And if in any case of capture no proceedings for adjudication are commenced within a reasonable time, any parties claiming the captured property may, in any District Court as a court of prize, move for a monition to show cause why such proceedings shall not be commenced, or institute an original suit in such court for restitution, and the monition issued in either case shall be served on the attorney of the United States for the district, and on the Secretary of the Navy, as well as on such other persons as the court shall order to be notified.'

'SEC. 4630. The net proceeds of all property condemned as prize, shall, when the prize was of superior or equal force to the vessel or vessels making the capture, be decreed to the captors; and when of inferior force, one half shall be decreed to the United States and the other half to the captors, except that in case of privateers and letters of marque, the whole shall be decreed to the captors, unless it shall be otherwise provided in the commissions issued to such vessels.'

'SEC. 4634. Whenever a decree of condemnation is rendered, the court shall consider the claims of all vessels to participate in the proceeds, and for that purpose

will be seen that by section 4615, if the captured vessel, or any part of the captured property, is not in condition to be sent in for adjudication,

shall, at as early a stage of the cause as possible, order testimony to be taken tending to show what part should be awarded to the captors, and what vessels are entitled to share; and such testimony may be sworn to before any judge or commissioner of the courts of the United States, consul or commercial agent of the United States, or notary public, or any officer of the Navy highest in rank, reasonably accessible to the deponent. The court shall make a decree of distribution, determining what vessels are entitled to share in the prize, and whether the prize was of superior, equal, or inferior force to the vessel or vessels making the capture. The decree shall recite the amount of the gross proceeds of the prize subject to the order of the court, and the amount deducted therefrom for costs and expenses, and the amount remaining for distribution; and whether the whole of such residue is to go to the captors, or one half to the captors and one half to the United States.

'SEC. 4635. A bounty shall be paid by the United States for each person on board any ship or vessel of war belonging to an enemy at the commencement of an engagement, which is sunk or otherwise destroyed in such engagement by any ship or vessel belonging to the United States or which it may be necessary to destroy in consequence of injuries sustained in action, of one hundred dollars, if the enemy's vessel was of inferior force, and of two hundred dollars, if of equal or superior force, to be divided among the officers and crew in the same manner as prize money; and when the actual number of men on board any such vessel cannot be satisfactorily ascertained, it shall be estimated according to the complement allowed to vessels of its class in the Navy of the United States; and there shall be paid as bounty to the captors of any vessel of war captured from an enemy, which they may be instructed to destroy, or which is immediately destroyed for the public interest, but not in consequence of injuries received in action, fifty dollars for every person who shall be on board at the time of such capture.'

Instructions:

'20. Prizes should be sent in for adjudication, unless otherwise directed, to the nearest home port, in which a prize court may be sitting.

'21. The prize should be delivered to the court as nearly as possible in the condition in which she was at the time of seizure; and to this end her papers should be sealed at the time of seizure and kept in the custody of the prize master. Attention is called to articles Nos. 16 and 17 for the government of the United States Navy. (Exhibit A.)

'22. All witnesses, whose testimony is necessary to the adjudication of the prize, should be detained and sent in with her, and, if circumstances permit, it is preferable that the officer making the search should act as prize master.

'23. As to the delivery of the prize to the judicial authority, consult sections 4615, 4616, and 4617, Revised Statutes of 1878. (Exhibit B.) The papers, including the log book of the prize, are delivered to the prize commissioners; the witnesses, to the custody of the United States marshal; and the prize itself remains in the custody of the prize master until the court issues process directing one of its own officers to take charge.

'24. The title to property seized as prize changes only by the decision rendered by the prize court. But, if the vessel itself, or its cargo, is needed for immediate public use, it may be converted to such use, a careful inventory and appraisal being made by impartial persons and certified to the prize court.'

'28. If there are controlling reasons why vessels may not be sent in for adjudication, as unseaworthiness, the existence of infectious disease, or the lack of a prize crew, they may be appraised and sold; and if this cannot be done they may be destroyed. The imminent danger of recapture would justify destruction, if there was no doubt that the vessel was good prize. But, in all such cases, all the papers and other testimony should be sent to the prize court, in order that a decree may be duly entered.'

'*Exhibit A.*

'ART 16. No person in the Navy shall take out of a prize, or vessel seized as a prize, any money, plate, goods, or any part of her equipment, unless it be for the better preservation thereof, or unless such articles are absolutely needed for the use of any of the vessels or armed forces of the United States, before the same are adjudged lawful prize by a competent court; but the whole, without fraud, con-

a survey and appraisement shall be had, the property sold, and the proceeds deposited subject to the order of the court; and by sections 4624 and 4625, captured vessels and property may be appropriated to the use of the United States, and the money value stand in place of the prize. And proceedings may be had where property which might have been brought in has been entirely lost or destroyed. Adjudication is contemplated in all cases.

By section 4635, a bounty is given for each person on board a vessel of the enemy which is 'sunk or otherwise destroyed' in an engagement, of $100 if the hostile fleet is of inferior, and of $200 if of equal or superior, force; and $50 for every person on board at the time of such capture, where the vessels | taken are immediately destroyed in the public interest p. 261
but not in consequence of injuries received in action.

This bounty is to be divided in the same manner as prize money, and the prize money in the one case and the bounty in the other cover the entire results of success.

We agree with counsel for libellant that the words 'sunk or otherwise destroyed' are equivalent to 'destroyed by sinking or otherwise.' There are two general classes then under the statute, vessels destroyed, and vessels captured and condemned, or appropriated.

The facts before us are somewhat peculiar and serve to illustrate the variant circumstances that may occur in naval engagements, and create modifications of the general classification. These vessels were run ashore and sunk by their own commanders, with the result that they were only temporarily disabled, and the commanding officer of our fleet, in the public interest, as the engagement closed, directed their destruction to be completed | by burning. In the report of the action, dated May 4, p. 262
1898, they were included among the vessels reported as burnt, but they were not included in the appraisement made by the board of appraisal and survey ordered in accordance with section 4624, and following, of the Revised Statutes, to survey, appraise and take a careful inventory of 'enemy's property captured and appropriated for the uses of the United States Government.' After hostilities were suspended an examination of the wrecks of the Don Juan de Austria, the Isla de Cuba and the Isla de Luzon was made, and subsequently the vessels were raised, under a contract entered into by the commander-in-chief for the Government, and reconstructed. If the vessels had not been raised and

cealment, or embezzlement, shall be brought in, in order that judgment may be passed thereon; and every person who offends against this article shall be punished as a court martial may direct.

'ART. 17. If any person in the Navy strips off the clothes of, or pillages, or in any manner maltreats, any person taken on board a prize, he shall suffer such punishment as a court martial may adjudge.

'*Exhibit B.*'

[Sections 4615, 4616 and 4617 Rev. Stat.]

saved, they would have remained abandoned as destroyed, but as they were saved and appropriated by the Government, they cannot be said in fact to fall within that category. We attach no importance to the official reports referring to the vessels as destroyed, which was true in
p. 263 the | sense in which the word was then used, for the question really is whether, when salvage had been effected, the Government can maintain that the captors did not take them, but that they were destroyed so that they could not be treated as prize.

The position of the Government is that as these vessels were sunk, and destroyed to such an extent that libellant's naval force was powerless to salve them by its own resources, their subsequent reconstruction and appropriation by the Government had no effect on their legal status, which had been determined immediately after the battle.

It is insisted that if not prize then they could not be prize afterwards, and yet it is not denied that when the question of title is settled by decree it takes effect by relation as of the date of the capture. And because this is so the fact that hostilities had ceased before the vessels were raised becomes immaterial.

The contention is that if a vessel lies on the bottom in shallow water,
p. 264 but in such a condition that she cannot be floated | by any of the means ordinarily possessed by a naval force, such vessel must be regarded as 'sunk' within the meaning of the statute, even though she has received no structural injury; or if a vessel, though not sunk, be so structurally injured as to destroy her power of floating and she cannot be repaired by any means possessed by the naval forces in the place where she lies, such vessel must be regarded as structurally 'destroyed' within the meaning of the statute.

And it is said that a close analogy is furnished by the cases of constructive total loss of a vessel, such as justifies an abandonment to the underwriters. Nevertheless counsel argues that there are differences between those cases and cases under section 4635. Thus, while it is admitted that in the former the owner need not abandon unless he see fit to do so, the right of election on the part of captors as to whether the vessel should be treated as destroyed or as a prize is denied in the latter; and another difference suggested is that the owner of a submerged or stranded vessel
p. 265 could contract with a third party to | raise it, while captors cannot. We think, however, that the alleged differences destroy the analogy altogether, or rather that its application when correctly stated leads to the opposite result. Abandonment rests on the election of the parties, and there was here neither a right of abandonment nor any acts from which abandonment on the one side and acceptance on the other could be fairly inferred.

The public interest required the United States and the captors to preserve the property, if that were possible; and it would be an anom-

alous conclusion to hold *in invitum* that the United States could pay bounty for these vessels as destroyed and at the same time retain and use them.

The vessels were not derelict, abandoned without hope of recovery, and on the contrary their preservation was recommended, and, in the circumstances, Commodore Dewey having duly taken the steps prescribed by the statute in respect of vessels confessedly captured, was not obliged to determine at once at his peril into which class these particular vessels fell and to literally comply with section 4615 in regard to captured property ' not in condition to be sent in for adjudication.'

War is not waged for predatory purposes, but Congress chose to grant reward for success, and in doing so cannot be assumed to have intended that such reward should be subjected to the restrictions of close bargains. The intention was that either prize money or bounty should be paid. Of course, by capture without destruction the Government might obtain distinct acquisitions, and the captors would be recompensed at the expense of the enemy.

Circumstances have frequently occurred in which the public interest has required the destruction of vessels capable in themselves of being brought in, as, for example, at the battle of the Nile, when Nelson was obliged to burn prizes in order to avoid the delay in refitting them, and the loss of the service of other ships to convoy them to Gibraltar ; but there his government could not assist him, or take the captured vessels off his hands.

Section 4635 provided that bounty should be paid in all cases where an enemy vessel of war was sunk or otherwise destroyed, either in an engagement, or in consequence of injuries received | in action, or after p. 266
capture when the destruction was for the public interest ; but the statute does not demand the construction that every vessel must be considered as destroyed, which, though susceptible of salvage and saved, could not have been, and was not saved, by the unaided resources of the capturing force.

It is true that when the Government succeeded in raising and restoring the vessels it saved them for itself, but it may reasonably be held that this was subject by relation to the right of the captors to an adjudication giving them, after the costs and expenses were deducted, a share in the residue of value.

If the effort at salvage had failed, or if the cost had equalled or exceeded the value, the captors would still be entitled to bounty, for it was not intended that the grant should be defeated by laying them under a rigid rule of election. And on the other hand these vessels were not ' appropriated to the use of the United States ' by the mere effort of the Government to raise them.

The act of raising was not the use contemplated by the statute. Such use was dependent on the success of the effort at salvage. The loss which might have been total, became on success partial, that is, confined to the extent of the expenditure, and the taking possession to accomplish that result, became by success appropriation to use.

The case of the Albemarle is in point, although apparently no opinion ruled the question in terms.

The Albemarle was sunk by Lieutenant Cushing on the night of October 27, 1864; was raised in March, 1865; reached Norfolk, April 27, 1865, and was appropriated to the use of the United States. She was appraised by a duly appointed board of naval officers and the value found was deposited by the Secretary of the Navy with the Assistant Treasurer of the United States at Washington. Proceedings to condemn the Albemarle as prize were instituted in the District Court of the United States for the District of Columbia and went to a decree of condemnation. The case was not reported, but the proceedings will be found in *Swan* v. *United States*, 19 C. Cl. 51, in the course of subsequent litigation; as also in *United States* v. *Steever*, 113 U. S. 747. No appeal
p. 267 was taken, and the conclusion that a | vessel thus situated could be decreed to be prize was accepted by all the Departments. We perceive no adequate reason to depart from that precedent.

2. As to the property taken from the vessels raised and reconstructed, and that taken from the vessels destroyed, we think its legal status must be regarded as the same as that of the vessel to which it belonged.

By section 4613 it is declared that the provisions of Title LIV shall apply to 'all captures made as prize by authority of the United States, or adopted and ratified by the President of the United States.'

The taking must be under such conditions as make the subject of the capture prize, and the sections preceding section 4635 recognize that property other than vessels may be prize, using the words 'ship and cargo,' 'vessel, arms, munitions or other material,' 'captured property,' 'prize property.' But section 4635 refers to the destruction of a 'ship or vessel of war,' which could not be 'sunk or otherwise destroyed' under that section, and be 'prize' under the preceding sections, and as we have already said the grant of bounty to be divided 'in the same manner as prize money,' appears obviously to have been 'intended as a substitute for the prize itself,' as ruled by Lowell, J., in *The Selma*, 1 Lowell, 30, or as given in lieu of prize money, as observed by Mr. Justice Field, in *Porter* v. *United States*, 106 U. S. 607.

No question of cargo is involved. Cargo is the lading of a ship or vessel, and may be prize when the vessel is not, or the vessel may be, when the cargo is not. The inquiry here relates to things belonging to the outfit of vessels of war, for whose capture prize money is paid,

and for whose destruction bounty is paid. The injury to the enemy is the same in either case, but the reward cannot be the same, as it is arbitrary in the one case, and not in the other, and arrived at in accordance with the general rules prescribed as required by the circumstances. The statute did not contemplate a division of the grant and an award of prize money and bounty in respect of the same transaction, unless, indeed, the capture embraced distinct and separate properties.|

What is included then by the term a 'ship or vessel of war' under section 4635? Whatever the toleration extended in courts of admiralty to the use, in practice, of words apparently superfluous, the word 'ship' embraces her boats, tackle, apparel and appurtenances because part of the ship as a going concern, and, for the same reason, 'ship or vessel of war' includes her armament, search lights, stores, everything, in short, attached to or on board the ship in aid of her operations. p. 268

The first Congressional legislation regulating prize was the act of March 2, 1799, 1 Stat. 715, c. 24, providing:

'SEC. 5. *And be it further enacted*, That all captured national ships or vessels of war shall be the property of the United States—all other ships or vessels, being of superior force to the vessel making the capture, in men or in guns, shall be the sole property of the captors—and all ships or vessels of inferior force shall be divided equally between the United States and the officers and men of the vessel making the capture.

'SEC. 6. *And be it further enacted*, That the produce of prizes taken by the ships of the United States, and bounty for taking the ships of the enemy, be proportioned and distributed in the manner following, to wit:

[Then followed twelve subdivisions in respect of the distribution of prize money.]

'13. The bounty given by the United States on any national ship of war, taken from the enemy and brought into port, shall be for every cannon mounted, carrying a ball of twenty-four pounds, or upwards, two hundred dollars; for every cannon carrying a ball of eighteen pounds, one hundred and fifty dollars; for every cannon carrying a ball of twelve pounds, one hundred dollars; and for every cannon carrying a ball of nine pounds, seventy-five dollars; for every smaller cannon, fifty dollars; and for every officer and man taken on board, forty dollars; which sums are to be divided agreeably to the foregoing articles.'

These sections admit of no other meaning than that the tackle, sails, apparel, stores, guns, ammunition and other appurtenances of captured national vessels of war should be the property of the United States, as well as the ships themselves, and so of ships or vessels going to the captors.|

And the acts of April 23, 1800; July 17, 1862; June 30, 1864, and he Revised Statutes, contain nothing inconsistent with that view. p. 269

Parsons, in his work on Marine Insurance, says that 'insurance on the ship covers all that belongs to it, as hull, sails, rigging, tackle, apparel, or furniture;' and he quotes from Emerigon, c. 10, § 2, p. 234: 'The expression, "on the body," embraces in its generality, as I have just said, all that regards the ship. Such are the hull of the vessel, its rigging and apparel, munitions of war, stores and victualling, advances to the crew, and all that has been expended in the fitting it out.' 1 Marine Ins. 524.

And in his work on Shipping and Admiralty, vol. 1, p. 78, the same author says: 'How much passes by the word "ship," or the phrase "ship and her appurtenances,—or apparel,—or furniture,"—or the like, cannot be positively determined by any definition. Stowell and Abbott agree, that whatever is on board a ship for the objects of the voyage and adventure in which she is engaged, belonging to the owners, constitutes a part of the ship and her appurtenances, within the meaning of the English statute of 53 Geo. 3, c. 159.'

That was an act 'to limit the responsibility of shipowners,' and provided that owners should not be liable 'further than the value of his or their ship or vessel, and the freight due or to grow due,' and in several clauses of the act the responsibility was referred to as limited 'to the value of the ship with all her appurtenances and freight.'

In *The Dundee*, 1 Hagg. 109, the question arose whether the value of certain fishing stores should be included. Lord Stowell held that it should, and that the word 'appurtenances,' distinguished between cargo, which was intended to be disposed of at the foreign port, and having a merely transitory connection with the ship, and those accompaniments that were indispensable instruments without which the ship could not perform its functions. The owners declared in prohibition in the King's Bench, *Gale* v. *Laurie*, 5 B. & C. 156, and Abbott, C. J., afterwards Lord Tenterden, announced the same conclusion, and, among other
p. 270 things, said: 'The fishing stores were not | carried on board the ship as merchandise, but for the accomplishment of the objects of the voyage; and we think, that whatever is on board a ship for the object of the voyage and adventure on which she is engaged, belonging to the owners, constitutes a part of the ship and her appurtenances within the meaning of this act, whether the object be warfare, the conveyance of passengers, or goods, or the fishery. This construction furnishes a plain and intelligible general rule; whereas if it should be held that nothing is to be considered as part of the ship that is not necessary for her navigation or motion on the water, a door would be opened to many nice questions, and much discussion and cavil.'

In *The Witch Queen*, 3 Sawy. 201, Judge Hoffman held that, where a vessel was supplied with a diving bell, air pump, and other apparatus

for the accomplishment of the enterprise in which she was about to engage, the lien of the materialmen extended to all articles belonging to the owner, which, not being cargo, had been placed on board for the objects and purposes of the voyage. The decision proceeded on our eighth rule in admiralty, referring to 'suits *in rem* against a ship, her tackle, sails, apparel, furniture, boats, or other appurtenances'; and *The Dundee*, decided twenty years before the adoption of the rule, was cited as showing the sense in which the term 'appurtenances' had been used.

To be sure, the words tackle, sails, apparel, boats, appurtenances, are not used in Title LIV, but we think that such minuteness was unnecessary, and that the words 'ship or vessel of war belonging to the enemy' are sufficiently comprehensive to embrace not only everything essential to the ship's navigation, but to the purposes of her existence.

Necessarily there is nothing in the distinction attempted to be drawn between the ship and her 'appliances and outfit,' nor can we concur in the view that the latter may be regarded as cargo in any aspect.

It is said that the destroyed hostile vessel of war should be held the subject of bounty, and property taken from her the subject of prize money because bounty alone would be an inadequate reward. |

This, even if true, would not justify us in attributing to the statute p. 271
a scope not permitted by its terms.

Section 4635 is couched in the same language as when enacted July 17, 1862, after the battle between the Monitor and the Merrimac had admonished us of the impending change in the construction of vessels of war, yet the bounty provision was reënacted in 1864, and incorporated into the Revised Statutes, and while in these days the amount of bounty may seem inconsiderable in comparison with the value of the vessel destroyed, we must take the statute as we find it.

3. The battle of Manila was fought on the first day of May, and on the third, the enemy's forces evacuated the Cavite arsenal, which was taken possession of by a landing party. This naval station contained a considerable amount of arms, munitions and material, for the repairing, equipment and fitting out of ships, and some non-seagoing boats were in use there. The property was appraised in due course; some of it was used in the Navy prior to the exchange of ratifications of the treaty of peace; and the remainder restored to Spain thereafter. The District Court declined to adjudicate this property to be prize because captured on land.

These were naval stores taken at a naval station, by a naval force, as the result of a naval engagement, and the question is whether the fact that they were taken from a navy yard instead of from a vessel rendered the statute inapplicable.

Generally speaking, forts, cities, lands taken from the enemy, are called conquests; movables taken on land, booty; on the high seas, prize. And the high seas include coast waters without the boundaries of low water mark, though within bays or roadsteads—waters on which a court of admiralty has jurisdiction. *United States* v. *Ross*, 1 Gall. 624.

Mr. Justice Story and Mr. Wheaton thought that the jurisdiction in prize extended 'as well to goods taken on land by a naval force, or in consequence of the operations of a naval force, as to property captured on the water.' Wheaton on Captures, 278; Pratt's Story's Notes on Prize Courts, 28; 2 Wheat. Appx. 1. Both these learned authors cite English authorities, and among them the leading case of *Lindo* v. *Rodney*, 2 Douglas, 613, note. |

p. 272 In that case the property was captured on the island of St. Eustatius, and a writ of prohibition to restrain the prize court was applied for. It was stated that the only question was 'whether the goods being taken on land, though in consequence of a surrender to ships at sea, excludes the only prize jurisdiction known in this kingdom.' The question was answered in the negative in an elaborate opinion and the rule discharged. Lord Mansfield, among other things, said: 'In short, every reason which created a prize court as to things taken upon the high seas, holds equally when they are *thus* taken at land. The original cause of taking is here at sea. The force which terrified the place into a surrender was at sea. If they had resisted, the force to subdue would have been from the sea. Mr. Piggott candidly said, it would be spinning very nicely, to contend, if the enemy left their ship, and got ashore with money, were followed upon land, and stripped of their money, that this would not be a sea capture. I agree with him, but I cannot distinguish that case from this. Both takings are literally upon land. In both, the prey is, as it were, killed at sea, and taken upon land. Here the capture of the goods on land is the immediate consequence of the surrender at discretion to a sea force. Would a sum paid by capitulation upon land have made it a sea or a land prize? *Cui bono* should all this subtilty be spun, when the reason for a jurisdiction to judge a capture at sea and such a capture at land is exactly the same?'

This reasoning shows that even though the general proposition may have been stated somewhat broadly by Story and Wheaton, circumstances may bring particular cases within it, and that mere contact with land does not *ipso facto* exclude jurisdiction in prize.

In *The Siren*, 13 Wall. 389, 392, Mr. Justice Swayne, speaking for the court, said: 'While the American Colonies were a part of the British Empire, the English maritime law, including the law of prize, was the maritime law of this country. From the close of the Revolution down to this time it has continued to be our law, so far as it is adapted to the

altered circumstances and condition of the country, and has not been modified by the proper national authorities.' |

It was there decided that a seagoing vessel captured by the Army p. 273
and Navy jointly was not subject of condemnation as prize, and that only captures made by naval force alone were so subject. 'Whenever a claim is set up,' said the court, 'its sanction by an act of Congress must be shown. If no such act can be produced the alleged right does not exist.'

Hence captures are made as prize for the benefit of captors when they come within the scope of our prize statutes, and not otherwise.

In *The Emulous*, 1 Gall. 563, 575, Mr. Justice Story said: 'The admiralty, therefore, not only takes cognizance of all captures made at sea, in creeks, havens, and rivers, but also of all captures made on land where the same have been made by a naval force, or by coöperation with a naval force. This exercise of jurisdiction is settled by the most solemn adjudications.'

The decree in *The Emulous* was reversed in *Brown* v. *United States*, 8 Cranch, 110, but that was on the ground of the unlawfulness of the taking, and so referred to by Mr. Justice Gray, in *The Paquete Habana*, 175 U. S. 667, 711.

In *United States* v. *269½ Bales of Cotton*, Woolworth, 236, an officer of the Army embarked a battalion of cavalry on vessels of the United States, and in the service of the Government, but not part of the naval force, and proceeding by river and by land penetrated into a certain district of Mississippi then held by the enemy, and by force of arms overpowered a body of hostile troops and took from their possession 269½ bales of cotton, which were subsequently libelled. And Mr. Justice Miller, on circuit, held that the cotton was captured by the Army and not by the Navy, and dismissed the libel. While Mr. Justice Miller there remarked that the result of *Brown* v. *United States*, was 'that property on land is not, without the aid of the statute, liable to capture and condemnation as prize of war,' yet after considering many English cases at some length, and referring to *The Emulous*, and the case of *Six Hundred and Eighty Pieces Merchandise*, 2 Sprague, 233, he said: 'In every one of the cases where the court has sustained its jurisdiction in prize, it appears that the force making the capture, or coöperating in the act, was the naval arm, or, by its presence and active assistance, it | contributed immediately in effecting the capture; that it operated from p. 274
the sea; that the place captured was an island, town, or fortress, itself established to resist naval attack, and to support and succor naval expeditions, and accessible from the sea, so that the attacking squadron could directly bring to bear upon it the stress of its armament.' And, referring to property captured on land by land forces, he added: 'How-

ever desirable it may be that, in a war between nations, there should exist a tribunal similar to the prize court, to administer the law of nations with reference to property captured on land, we find no warrant for asserting that any such authority exists in the admiralty courts of the United States, unless the circumstances of the capture show some element of a force operating from, or on, the water, which would bring it within the recognized rules on that subject.'

In the case of *Mrs. Alexander's Cotton*, 2 Wall. 404, a joint expedition of gunboats under Rear Admiral Porter and a body of troops under Major General Banks proceeded up the Red River, and, during its advance, seventy-two bales of cotton, the private property of Mrs. Alexander, were taken from her plantation, where they were stored in a cotton-gin house about a mile from the river, by a party from one of the gunboats. The cotton was hauled by teams to the river bank, sent to Cairo, libelled as prize of war in the District Court for the Southern District of Illinois, May 18, 1864; claimed by Mrs. Alexander; sold *pendente lite*, and the proceeds decreed to her. The United States appealed and asked the reversal of the decree and the condemnation of the cotton as maritime prize. This court held that the capture was justified by legislation and by public policy, but that the property was not maritime prize; that there was no authority to condemn any property as prize for the benefit of the captors except under the act of July 17, 1862, 12 Stat. 600, c. 204; and that as the second section of that act provided that ' the proceeds of all ships and vessels, and the goods taken on board of them, which shall be adjudged good prize,' should be the property of the captors, in whole or in part, property on land was excluded from the category of prize for the benefit of captors, and that this was decisive
p. 275 of the case | so far as claims of captors were concerned. The decree was reversed and the cause remanded with directions to dismiss the libel.

In that case the capture was the result of a joint expedition; the property was private property; unprotected and stored at a distance from the river; valuable for domestic use, and so valuable as to be of peculiar assistance to the enemy, but not in any sense war material.

In the present case the capture was made by naval force alone; the property was public property, consisting of arms, munitions and naval material; in a naval station taken through the operations of the fleet from the sea.

For the reasons indicated by Mr. Justice Miller, in harmony with the observations of Lord Mansfield, the rulings in that case and in *The Siren* are not controlling in this, and, moreover, the terms of the applicable statute are not the same.

The sections constituting Title LIV of the Revised Statutes were brought forward from the act of June 30, 1864, 13 Stat. 306, c. 174.

Section 2 of the act of July 17, 1862, referred to by Mr. Chief Justice Chase in the case of *Mrs. Alexander's Cotton*, reads as follows: 'That the proceeds of all ships and vessels, and the goods taken on board of them, which shall be adjudged good prize, shall, when of equal or superior force to the vessel or vessels making the capture, be the sole property of the captors; and when of inferior force, shall be divided equally between the United States and the officers and men making the capture.'

This section was identical with section 5 of the act of April 23, 1800, and was expressly repealed by section 35 of the act of June 30, 1864, while section 10 of the latter act, afterwards section 4630 of the Revised Statutes, provided: 'That the net proceeds of all property condemned as prize shall, when the prize was of superior or equal force to the vessel or vessels making the capture, be decreed to the captors; and when of inferior force, one half shall be decreed to the United States and the other half to the captors;' and section 33: 'That the provisions of this act shall be applied to all captures made as prize by the authority of the United States, or adopted and ratified | by the President of the United p. 276
States;' which was reënacted as section 4613 of the Revised Statutes.

The effect of this legislation was not to revive section 5 of the act of 1800 as contended, nor to give jurisdiction in admiralty in respect of property captured on land by land forces, but if the language of the act of 1862 confined the rights of captors to the proceeds of ships and cargoes, it seems clear that the language of the act of 1864, that the captors should be entitled to 'the net proceeds of all property condemned as prize,' operated to so far remove the restriction as to permit the statute to extend to other property fairly coming within accepted rules of prize.

The District Court thought the words inadequate to produce this result, and carefully examined other sections of the act of 1864, which referred to vessels and cargoes as the usual subjects of prize. But we should remember that that statute, and Title LIV, into which it was carried, embraced prize in general, and that vessels and their cargoes most frequently constituted prize property brought in for adjudication. So that in making provision in that regard, Congress was obliged to use such terms as even to give color to the argument that enemy's vessels of war could not be condemned at all for the benefit of captors, and that bounty was their only reward, as was the case under the act of 1799. But it is conceded that this is not so, and we think that these sections ought not to be given the restrictive force attributed to them.

We are also unable to see that the significance of the change in phraseology is lessened when considered with the other legislation referred to.

The act of March 12, 1863, 12 Stat. 820, c. 120, provided for the collection of all abandoned or captured property in insurrectionary districts, and 'that such property shall not include any kind or description

which has been used, or which was intended to be used, for waging or carrying on war against the United States, such as arms, ordnance, ships, steamboats, or other water craft, and the furniture, forage, military supplies, or munitions of war.' Section 7 read: 'That none of the pro-
p. 277 visions of this act shall apply to any lawful maritime prize by | the naval forces of the United States.' The property excepted had been declared 'lawful subject of prize and capture wherever found;' and it was made the duty of the President 'to cause the same to be seized, confiscated, and condemned,' by the confiscation act of August 6, 1861, 12 Stat. 319, c. 60. This act referred to property taken when used, or intended to be used, in waging war against the United States, while the act of 1863 referred to property not so used or intended to be.

By the second section of the act of March 3, 1863, 'further to regulate proceedings in prize cases,' 12 Stat. 759, c. 86, it was provided that 'any captured vessel, any arms or munitions of war, or other material,' might be taken 'for the use of the Government,' and the value deposited in the Treasury of the United States, and for prize proceedings. This act was expressly repealed by section 35 of the act of June 30, 1864, section 10 of which act, as already seen, provided that the captors might share in the net proceeds of all property condemned as prize.

Section 7 of the act of July 2, 1864, 13 Stat. 377, c. 225, reads: 'That no property seized or taken upon any of the inland waters of the United States by the naval forces thereof, shall be regarded as maritime prize; but all property so seized or taken shall be promptly delivered to the proper officers of the courts, or as provided in this act and in the said act approved March twelve, eighteen hundred and sixty-three.' These various acts growing out of the civil war cannot be regarded as having any important bearing on the act of June 30, 1864, and Title LIV, in so far as the particular modification of the act of 1862 is concerned.

And neither these acts, nor sections 5308 to 5311, in respect of insurrection, and par. 9 of section 563, and par. 6 of section 629, Revised Statutes, affect the result we have reached.

In our opinion it would be spinning altogether too nicely to hold that because enemy property on land cannot be taken in prize by land operations, public property designed for hostile uses, and stored on the sea shore in an establishment for facilitating naval warfare, might not be made prize, under the statute, when captured by naval forces operating directly from the sea. |

p. 278 But while the property in question was in general susceptible of condemnation in prize, it was nevertheless taken subject to the exercise of the power of restitution. The right of the Government is supreme, and when in its judgment the public interest demands it, prizes may be restored, and the courts cannot proceed to condemnation.

In *The Elsebe*, 5 Rob. 155, Lord Stowell, then Sir William Scott, decided that up to the period of final condemnation, the Crown can, by virtue of its prerogative, restore a prize to the enemy from whom it has been captured, and may take this step without consulting the captors.

The principle is fully discussed and sustained by unanswerable reasoning, and is not shaken by his subsequent observations in *The St. Ivan*, Edw. 376, that 'captors bring in their prizes subject to such interposition on the part of the Crown; but it is of very rare occurrence, and speaking with all due reverence ought to be of rare occurrence, and only under very special circumstances; as, for instance, where the detention of the vessel may be detrimental to the general interests of the country.'

Until condemnation captors acquire no absolute right of property in a prize, though then the right attaches as of the time of the capture, and it is for the Government to determine when the public interests require a different destination. In respect of whatever was restored under the treaty with Spain the Government must be regarded as absolved from liability.

It further follows from the views we entertain as justifying condemnation of a portion of this property, that the capturing naval force must be held to have been superior within the contemplation of the statute, according to previous decision.

4. The libel was amended some months after it was filed so as to cover certain cascoes or small native boats, and also two floating derricks or wrecking boats, the property of private citizens residing in the Philippine Islands. These cascoes appear to have been large barges, propelled by sweeps and by poling, of from thirty to sixty tons capacity, of the value of from $1500 to $1800, Mexican, each, and used in discharging cargoes. The wrecking boats were flat boats, the largest being forty feet long and fifteen feet broad. They had no means of propulsion, were | not seagoing p. 279
boats in any sense, and could only be used in comparatively smooth water. All these boats may have been the private property of Filipinos, but that is not clear.

It may well be doubted if these craft came within the words ship or vessel as used in Title LIV. Whether in the circumstances they could justly be treated as technically enemy property, is a question not so presented as to require discussion. They were put to public use by the commanding officer, but what ultimately became of them does not appear from the record. If restitution was made, they have ceased to be within the jurisdiction. And in any view, we are of opinion that they came within the considerations set forth in *The Paquete Habana*, 175 U. S. 677; and that the District Court rightly held that they were not subject to condemnation.

We are of opinion that the District Court committed no error in its decree in respect of the Don Juan de Austria, the Isla de Cuba and the Isla de Luzon, and the property taken from them, as well as the vessels captured and their appurtenances; or in respect of the lighters and wrecking boats; but that a share in a portion of the naval stores and material captured in the Cavite arsenal, and the boats pertaining thereto, should have been awarded; and that the decree should not have included property taken from vessels sunk and destroyed.

And this brings us to consider:

5. The decree dismissing the intervention of Stovell.

This was an intervening libel filed by Edward F. Stovell as captain of the Nanshan, on behalf of its officers and crew, as well as himself, seeking to participate in the prize money that might be awarded on the main libel. Stovell had previously made an application in the Court of Claims to participate in the bounty awarded for vessels destroyed under section 4635 of the Revised Statutes, which was dismissed by that court. 36 C. Cl. 392.

The record in the Court of Claims was made the record in the District Court on the intervention of Stovell, and forms part of the record on this appeal. The facts are correctly summarized by Weldon, J., in the opinion of the Court of Claims, as follows: |

p. 280 'The facts found by the court show that the claimant was captain or master of the original crew of the Nanshan, which was a British merchant vessel, purchased by Admiral Dewey at Hong Kong, under authority of the Secretary of the Navy, in April, 1898. The vessel was not commissioned, but was registered as an American steamer, and the original crew was shipped in the American merchant service. The crew were employed to handle the ship, and the officers and men were promised and received double the wages they had theretofore been paid in the British merchant service. They were not rated in the United States Navy, and the double wages were not the rates of pay fixed by the President under authority of Revised Statutes, section 1564. The arrangement as to the employment and payment of the crew was the result of an agreement made by Admiral Dewey with the original officers of the Nanshan. A monthly list of the names and wages of the crew, in Mexican money, was made by the original captain or master, the aggregate amount of which was received by him from the pay inspector of the fleet in a lump sum, reduced to the value of American gold, which money the captain distributed to his original crew.

'Admiral Dewey placed on board a naval officer, Lieut. Benj. W. Hodges, and four enlisted men, and two mounted 1-pounder guns. The master of the Nanshan, Capt. Edwin F. Stovell, remained on board, and under him were shipped the seamen, as aforesaid. The naval officer

exercised control over the vessel and gave all orders concerning her. The merchant captain was merely his executive officer, being familiar with the crew. The Nanshan did not approach the Spanish fleet during the battle of Manila near enough to enable her to be of any service. The guns were mounted on her as a protection from boat attacks, but not for offensive operations. At the time and during the battle of Manila, Lieut. Benj. W. Hodges had been detailed as aforesaid with four men of the Navy for duty on said vessel, and was so engaged on said vessel as above stated at and during the time of the battle. The Nanshan was loaded with 3000 tons of coal. The Raleigh was detailed as a special guard in case the reserve division was attacked separately by the enemy. | The duty of the naval captain on said ship was to take general charge of p. 281
the vessel, execute all orders from the flagship controlling the movements of the Nanshan, the handling of the guns, and the signalling, but not to interfere with the internal management and discipline of the ship and such things as loading and discharging cargo.

'After the vessel was bought by Admiral Dewey, the Nanshan crossed the China Sea with the fleet and was a part thereof. She kept her position in the fleet. After the fleet stopped at Subig Bay the Admiral ordered her commander to come on board the flagship for his final orders, afterwards returning to the Nanshan. The fleet started in single column, the Olympia leading, followed by the Baltimore, the Raleigh, the Petrel, the Concord, the Boston, the McCullough, the Nanshan, and Zafiro, passing the forts in that order. The forts on the south side of the channel fired upon the fleet as they were entering Manila Bay, and the Nanshan passed through that fire. The Nanshan was in reserve during the action, within signaling distance. She had on board two 1-pounders, taken from the Olympia, with 360 rounds of ammunition for those guns; also 11 rifles from the Raleigh and 11 revolvers, with a suitable amount of ammunition, and two boats rigged ready to lower to pick up men if it was found necessary to do so. The Nanshan was a heavy ship, being loaded to the underwriters' mark with coal.

'At the time and during the battle of Manila the Nanshan was between 4 and 5 miles of the Spanish fleet engaged in that action. She was within signaling distance of the fleet that effected the destruction of the Spanish vessels, but was not in such condition as to afford effective aid, her guns not being able to produce any effect upon the Spanish vessels; she was ordered to lay off in the bay, clear of the fleet; she could not have been brought within effective range, because her guns were too light.'

Section 4614 provides: 'The term "vessels of the Navy," as used in this Title, shall include all armed vessels officered and manned by the United States, and under the control of the Department of the Navy.'

p. 282 Section 4632 : ' All vessels of the Navy within signal distance | of the vessel or vessels making the capture, under such circumstances and in such condition as to be able to render effective aid, if required, shall share in the prize ; and in case of vessels not in the Navy, none shall be entitled to share except the vessel or vessels making the capture ; in which term shall be included vessels present at and rendering actual assistance in the capture.'

The Court of Claims held on the facts that the Nanshan was not at the time of the battle of Manila in such a condition as to enable her to render effective aid, if required ; that she was performing the functions of a collier, to be protected instead of to act aggressively ; that her crew had never been enlisted in the Navy, but had been employed simply to perform manual labor ; that the two 1-pounders and the small arms she had on board were for purposes of defence rather than attack ; that ' she was not kept in the relation which she sustained to the engagement for strategic purposes, but for the purpose of protection to herself and the incident protection of the rest of the fleet as the source of their coal supply ; ' and that she could not participate in prize money awarded under section 4632.

By the fifth clause of section 4631, which treats of the distribution of prize money, after certain deductions, the remainder is to be distributed ' among all others doing duty on board, including the fleet captain, and borne upon the books of the ship, in proportion to their respective rates of pay in the service ; ' and under section 1569 the pay to petty officers, seamen and others must be fixed by the President. The Court of Claims further decided that as intervenors were shipped and not enlisted, and their pay had not been fixed by the President, but was a matter of agreement with the officer who shipped them, this furnished an additional reason for holding that they were not entitled to share in the prize money.

It is agreed that the decision as to the Nanshan determines the case of the Zafiro.

The District Court adjudged ' that the Nanshan and Zafiro, not participating in any of said captures and not being armed vessels of the United States within signal distance of the vessel or vessels making the
p. 283 capture, under such circumstances and in | such conditions as to be able to render effective aid, if required, are not entitled to share in any of the prize property.'

Notwithstanding the ingenious argument on behalf of the intervenors, we are not able to arrive at any different conclusion, and to hold that the Nanshan and Zafiro were part of the fighting force of the Navy in the battle, or present under such circumstances and in such condition as to be able to render effective aid in that engagement, as prescribed

by the statute. They participated neither actually nor constructively in the captures.

The rights to share of the commissioned officers and enlisted men of the United States Navy on board these two vessels depend on other considerations.

The decree of the Supreme Court of the District of Columbia on the intervening libel is affirmed. The decree on the libel is reversed and the cause remanded with directions to enter a decree in accordance with this opinion.

The Paquete Habana.

(189 U.S. Reports, 453) 1903.

APPEALS FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE SOUTHERN DISTRICT OF FLORIDA.

Nos. 578, 579, 580, 581, 582, 583, 584, 585, 586, 587, 588, 589.[1] Argued March 19, 1903.—Decided April 6, 1903.

This court having decided in *The Paquete Habana*, 175 U. S. 677, that certain fishing smacks engaged in coast fishing for the daily market were not liable to capture, and ordered that the proceeds of vessels and cargoes be restored to the claimants with compensatory and not punitive damages and costs, and it appearing that the damages allowed were excessive, the cases were remanded to the District Court for further proceedings.

Under the circumstances of this case the decree should be entered against the United States and not against the captors individually.

THE case is stated in the opinion of the court.

Mr. Solicitor General Hoyt for the United States.

The court is free to weigh and settle the facts here uncontrolled by subordinate findings. The inquiry is whether the court is satisfied by the whole evidence. *The Vigilantia*, 1 Rob. 1; *The Soglasie*, Spinks, 104; *The Carlos F. Roses*, 177 U. S. 655. *The Vigilantia* and *The Soglasie* exhibit the reasonable doubt of courts respecting the certificates of national magistrates presumably complaisant toward their countrymen. Early cases in this court show that the court handles such awards with great freedom, allowing some items and rejecting others, in the exercise of its discretion. *The Apollon*, 9 Wheat. 362; *The Lively*, 1 Gall. 315; *The Charming Betsy*, 2 Cr. 64; *Maley* v. *Shattuck*, 3 Cr. 458; *The Amiable Nancy*, 3 Wheat. 546.

The claims are excessive and unconscionable, and the evidence in support of them unsatisfactory and inconclusive. The | witnesses are in p. 454

[1] No. 578. *United States* v. *The Paquete Habana*; No. 579. *Same* v. *The Lola*; No. 580. *Same* v. *The Poder de Dios*; No. 581. *Same* v. *The Antonio y Paco*; No. 582. *Same* v. *The Engracia*; No. 583. *Same* v. *The Severita*; No. 584. *Same* v. *The Antonio Suarez*; No. 585. *Same* v. *The Fernandito*; No. 586. *Same* v. *The Oriente*; No. 587. *Same* v. *The Espana*; No. 588. *Same* v. *The Cuatro de Settembre*; No. 589. *Same* v. *The Santiago Apostol.*

the highest degree interested, and the inference of a combination of interest throughout the cases is irresistible. The reappearance of the same witnesses and claimants in different cases, and the corporate relations shown suggest that the ownership of these boats and the handling of their catch constituted a sort of Havana 'fishing trust.' The interrogatories called for candid and complete answers. Forgetfulness, failure to keep books, the omission to furnish bills of sale, statements about documents which the documents do not support—these things find no excuse in the form of the interrogatories. It was for the claimants to support their claims absolutely and completely. The harbor master's certificate is given as to all the vessels on the same day, long after the final condemnation below, appraising them as of the same date prior to the war. That officer admittedly acts as an expert appointed by the two firms chiefly interested to appraise the value of their respective fishing smacks. His testimony and certificate should not be accepted as a veritable and reasonable statement of the value of the vessels. Sufficient appears fairly to require the court to reject the exaggerated claims, and, indeed, sufficient appears to enable the court, justly and understandingly to fix the point between the prices realized at the government sale and the amounts claimed, which will give *restitutio in integrum.*

If the court thinks that a satisfactory basis of readjustment and settlement is not yet before it, then we submit that the cases should go back to the court below for further inquiry.

As to the naval captors' liability, *The Ostsee,* Spinks, 174, fully reviews the principles and authorities. The captors seize at their peril; they take the burden and the risk along with the possible benefits. The only question is whether the claimants are in fact entitled to restitution with damages and costs. *The Ostsee* decided that captors are liable; that they may afterwards be indemnified at the expense of the public makes no difference in the rule. They cannot be so indemnified by means of a judgment against the United States. It is for Congress to relieve them. The cases in this court, *Murray* v. *The Charming Betsy,* 2 Cr. 64; *Little* v. *Barreme,* 2 Cr. 170; *Maley* v. *Shattuck,* 3 Cr. 458, show that the
p. 455 seizors have always | been held liable for restitution in value. The distinctions and qualifications as to government exemptions from liability, *The Siren,* 7 Wall. 162, speak for themselves and do not comprehend the present cases. The same remark is true of *The Neustra Señora de Regla,* 108 U. S. 96, in which the reduction of the claim is significant, and the original hearing is instructive on the general doctrine of the government exemption from liability in the courts.

The Government by its commission and war instructions authorizes capture, but does not thereby adopt the acts of its officers as its own, or condone their errors, or assume the liability arising upon their wrongful

acts, however ' pure in intention ' the wrong may be. Such an idea is flatly contrary to all the principles of government exemption from suit and responsibility for the acts of its officers and agents except so far as it has expressly made itself liable. The Government grants prize rights to captors, and libels on behalf of captors and itself. The Government may restore, even after libel filed, at any time before condemnation ; that fact would give disappointed captors no claim against the Government. If the executive should determine to recognize a diplomatic claim (which may be interposed after condemnation) that does not summon the captors to respond. Equally, if there is a judicial decree of restitution with damages and costs, that does not call upon the Government to respond because it files the libel and is the formal party plaintiff. The ' captors,' that is, the actual commander of the offending vessel representing all of his subordinates, must meet the responsibility of the illegal act of seizure.

Mistaken practice in the lower courts or inferences from particular acts of Congress granting indemnity cannot avail to overturn an established rule. As in England the appeal for relief is to Crown or Parliament, here it is to Congress. The courts cannot recognize that appeal by giving judgment against the United States, even if it should be a nugatory judgment not subject to execution. We urge with conviction that any award to claimants here must rest upon the various naval captors and not upon the United States. |

Mr. J. Parker Kirlin for claimants. p. 456

I. No sufficient ground for the reversal of the decree is shown, so far as the *quantum* of the damages is concerned.

1. There is no serious dispute as to the principle on which the damages are to be assessed. The claimants are entitled to ' fair indemnity for the losses sustained by the seizure.' *The Nuestra Señora de Regla*, 17 Wall. 29, 31. The owners of the vessels being Cubans, and the vessels having been seized in Cuban waters when about to enter Cuban ports, the damages are naturally to be measured with reference to the value of the vessels and property in Cuba rather than in the United States. *Bates* v. *Clark*, 95 U. S. 204, 210. The damages to be awarded should be equivalent to the injury sustained. *The Lively*, 1 Gallison, 315 ; *Hetzel* v. *Baltimore & Ohio Ry.*, 169 U. S. 26. This principle is impliedly recognized in the mandates issued under the previous decision, which provided that the damages should be ' compensatory.'

The assessment of the damages was referred by consent to the commissioner. His conclusions, therefore, will not be disturbed, unless they are clearly in conflict with the weight of the evidence. *The Elton*, 83 Fed. Rep. 519, 520 ; *Kimberley* v. *Arms Co.*, 121 U. S. 512, 524 ; *Davis* v. *Schwartz*, 155 U. S. 631, 636 ; *Crawford* v. *Neill*, 144 U. S. 585, 596 ;

Furrer v. *Ferris*, 145 U. S. 131. Even if the reference had not been made on consent, the conclusions of the commissioner on matters of fact would still be entitled to much weight. *Tilghman* v. *Proctor*, 125 U. S. 136, 149.

The District Judge heard argument on the libellant's exceptions to the report, and, after consideration, overruled them and confirmed the report. The case comes before the court, therefore, with the concurrent finding of the commissioner and the court in favor of the claimants. Under these circumstances the court should decline to interfere with the amount of the decrees, unless manifest error appears. *The Ship Marcellus*, 1 Black, 414; *The Conqueror*, 166 U. S. 110, 136.

2. The evidence produced on the part of the claimants consisted of the depositions of the owners of the vessels and of the harbor master in
p. 457 the port of Havana in relation to the value | of the vessels, and of certain disinterested fish merchants as to the value of the fish. The evidence of the libellant consisted, for the most part, of the depositions of witnesses who did not profess to have any acquaintance with the value of fishing vessel property. The commissioner heard some of the witnesses for the Government, but accepted the evidence of the claimants' witnesses as more accurate and reliable. It is contrary to the practice of the court to reverse a decree where both courts below have concurred in the decision of questions of fact, and the result arrived at depends on the number or credibility of witnesses. *The Richmond*, 103 U. S. 540, 543.

3. The exceptions to the commissioner's report are insufficient to raise any question as to the amount of the damages. The exceptions were:

'First, that the amount allowed as compensatory damages for the following vessels, and each of them, is excessive and not sustained by the evidence;' and,

'Second, that the value of each of said vessels . . . as ascertained by the commissioner is contrary to the evidence.'

No suggestion was made as to the amount which the United States attorney thought the evidence would justify as an allowance for compensatory damages. Exceptions expressed in almost identical terms were held to be insufficient in *The Commander-in-Chief*, 1 Wall. 43, 50.

4. The status of the claimants does not affect their right to receive full compensation. Even if the claimants were technically in the position of enemies at the time of the captures, the court has, nevertheless, determined that their property was entitled to exemption from capture. In awarding compensation, therefore, the property is to be dealt with in the same manner as the property of friends. If its value was enhanced by reason of the war, that fact would not be material in measuring the damages except as showing the values current at the time when the right to compensation accrued. The right to compensation has been determined, and the damages are to be measured by the value of the property

at the time of the capture, with interest and costs. If that value was enhanced by the military or naval operations of our Government, the claimants are, nevertheless, | entitled to be paid at the enhanced amounts ; p. 458
for they represented the value which the property would have possessed, and at which, presumably, it could have been disposed of, but for the unlawful capture and condemnation. These observations apply alike to the valuations of the vessels, and to the current price for the fish, at the time of the capture, as to which there is no dispute.

5. There was no error in the award of interest, or the rate at which it was allowed. No question on that subject, however, is properly before the court. There was no exception to the report of the commissioner as to the rate of interest, or as to the propriety of allowing it. Nor is there any assignment of error to the final decrees on this subject. Without any exception or assignment of error on the subject, no question relating to interest appears to be before the court. *The Commander-in-Chief*, 1 Wall. 43.

Interest has always been allowed in cases of this class, not only against private captors, but against the United States. *The Apollon*, 9 Wheat. 362, 376, 379, 380 ; *The Charming Betsy*, 2 Cranch, 64, 125 ; *The Anna Maria*, 2 Wheat. 327 ; *The Amiable Nancy*, 3 Wheat. 546, 562, 563 ; *The Nuestra Señora de Regla*, 108 U. S. 92, 104. The records in the cases of *The Labuan*, Blatchford's Prize Cases, 165 ; *The Glen*, Blatchford's Prize Cases, 375 ; *The Sybil*, Blatchford's Prize Cases, 615, show awards of interest against the United States and the captors jointly. The allowance of interest was within the fair scope of the mandates as a part of the ' compensatory damages ' to be recovered.

In allowing the legal rate of eight per cent, which prevails by statute in the Southern District of Florida, the court followed the practice which is sanctioned by this court. *Texas & Pacific Ry. Co.* v. *Anderson*, 149 U. S. 237, 242 ; *The Conemaugh*, 189 U. S. 363 ; *Huey* v. *Macon Co.*, 35 Fed. Rep. 431 ; 1 Sedgwick on Damages, 8th ed. sec. 339. There can be no presumption that the rate of interest in Cuba, during or immediately following the war, when financial conditions were, notoriously, in an extremely unsettled condition, was less | than the legal rate prevailing in p. 459
the district in which the final decrees in these cases were entered.

II. The District Judge committed no error in deciding that the compensatory damages awarded to the claimants under the mandate of this court were payable by the United States.

1. It appears to have been determined by the previous decision of the court that the compensatory damages awarded are to be paid by the United States.

It would seem that the only parties to these causes are the United States on the one hand, and the claimants of the vessels on the other.

Section 4618 of the Revised Statutes provides that ' upon receiving the report of the prize master directed by the preceding section, the attorney of the United States for the District shall immediately file a libel against such prize property, and shall forthwith obtain a warrant from the court directing the marshal to take it into his custody, and shall proceed diligently to obtain a condemnation and distribution thereof.' Section 4630 provides that ' the net proceeds of all property condemned as prize shall, when the prize was of superior or equal force to the vessel or vessels making the capture, be decreed to the captors ; and when of inferior force, one half shall be decreed to the United States and the other half to the captors.'

In pursuance of these provisions libels were filed by the United States, through its attorney for the Southern District of Florida, in all the cases, and in the original decrees of condemnation it was ' ordered, adjudged and decreed that the said sloop . . . and cargo are condemned and forfeited *to the United States* as lawful prize of war.' Certain naval officers filed their depositions in the cases, claiming shares of the prize money.

Any intervention of this character, however, is permissible only after final decree of condemnation, and is authorized only for the purpose of enabling the court to make distribution of the proceeds of the prize. Rev. Stat. §§ 4631, 4634. It seems doubtful, to say the least, that claims to distributive shares of that portion of the prize money which, under the statutes, falls to the captors, make the officers who present them parties to the cause.

p. 460 The parties who were before this court on the previous appeal were, therefore, the claimants of the vessels on one side, and the United States on the other. As between those parties the court decreed in each case that ' the decree of the District Court be reversed and the proceeds of the sale of the vessel, together with the proceeds of any sale of her cargo, be restored to the claimants with damages and costs.' *The Paquete Habana*, 175 U. S. 677, 714. On a subsequent day the court on motion of the Solicitor General, ordered ' that the decree be so modified as to direct that the damages to be allowed shall be compensatory only and not punitive.' 175 U. S. 677, 721.

This is the judgment of the court between the only parties who were before it. The plain effect of the decision appears to be that the court determined that the compensatory damages to be recovered by the claimants were to be paid by the United States. This determination must be taken as final and conclusive throughout the subsequent stages of the litigation. *The Nuestra Señora de Regla*, 108 U. S. 92, 100 ; *Clark* v. *Keith*, 106 U. S. 464 ; *Supervisors* v. *Kennicott*, 94 U. S. 499 ; *The Lady Pike*, 96 U. S. 461.

No motion was made to amend the mandate so as to provide, if it had

been competent to do so, that the judgment should be against the captors as well as the United States, or that it should be against the captors alone. In the absence of such an amendment the District Court had no power or authority to enter any decree, except against the libellant of record. *In re Potts*, 166 U. S. 263, 265, 267–268.

2. If it be considered that the court below had authority, in executing the mandate, to enter a decree against the captors alone, or against the United States and the captors jointly, it was, nevertheless, justified by the practice and by precedent in entering decrees against the United States alone, as was done.

It is the settled practice in prize cases, where restitution is ordered with damages, to assess and award the damages in the original cause against the libellants therein.

This was done without question in cases that arose prior to 1861. *The Charming Betsy*, 2 Cranch, 64; *The Amiable* | *Nancy*, 3 Wheat. 354; p. 461
The Apollon, 9 Wheat. 362. The rule was recognized by Congress in the act concerning letters of marque, prizes and prize goods, passed June 26, 1812. 2 Stat. 759, 761.

Since the enactment of the prize acts of August 6, 1861, 12 Stat. 319; March 3, 1863, 12 Stat. 759; and June 23, 1864; Rev. Stat. §§ 4613, 4652, it has been the practice to file all libels in prize causes in the name of the United States. No case has been found in which the United States appears as libellant and damages for unlawful capture have been awarded against the naval captors. On the contrary, the practice, since 1861, has been to award the damages against the United States alone, or, in cases where the captors have intervened before condemnation and asked to be made co-libellants, against the United States and the naval captors jointly.

The records on file in a number of cases in the District Court for the Southern District of New York in which the United States was libellant and the captors intervened and joined in the prayer for condemnation, show that judgment was entered jointly against the United States and the captors in the following form: 'It is ordered and adjudged . . . that final judgment be, and the same is hereby, rendered in the above cause in favor of the claimants of said vessels and cargo against the libellants and captors for the sum of $ '. *The Glen*, Blatchf. Prize Cases, 375, final decree entered by Betts, J., October 24, 1863; *The Labuan*, Blatchf. Prize Cases, 165, final decree entered by Benedict, J., March 25, 1868; *The Sybil*, Blatchf. Prize Cases, 615, final decree entered by Blatchford, J., March 2, 1868.

In all these cases Congress passed appropriations to pay the decrees. 13 Stat. 575; 16 Stat. 649; 16 Stat. 650. Judgment was directed against the United States alone in *The Nuestra Señora de Regla*, 108 U. S.

92. The liability of the United States in such cases appears to be recognized by implication in Rev. Stat. § 4640.

3. The United States, by entering the forum as an actor, and prosecuting to condemnation, for its own and its agents' joint use, the vessels
p. 462 whose unlawful capture it had ratified and confirmed, | has submitted itself voluntarily to the jurisdiction of the court, and is bound, under the universal practice in prize causes, to compensate the claimants for their loss.

These are not actions of tort against the United States. They are mere claims for the restitution of property which the Government has unlawfully taken from private individuals. The principle involved is that property which one has wrongfully taken shall be returned, or if, by the procurement of the wrongdoer, it cannot be returned in specie, its value should be returned.

If the Government had taken the vessels and applied them to its own use, instead of procuring them to be condemned and sold, without legal right, there could be no question that it would be bound to return them, or their value. *United States* v. *Russell*, 13 Wall. 623; *Clark* v. *United States*, 95 U. S. 539. It may be that this is the principle which underlies the decision in *The Nuestra Señora de Regla*, 108 U. S. 92. Nor could there be any question of the right of the prize court to order the United States to restore the vessels, if they still remained in specie and were subject to its control.

It would appear to be an extreme refinement of principle which would deprive the court of jurisdiction to determine that the United States should refund the value of the property unlawfully taken, simply because it is now beyond the power of the Government, solely in consequence of its own action, to return the vessels themselves.

No claims are made against the Government, beyond the value of the property against which it proceeded and which it caused to be condemned. They are, in substance, merely claims for restitution. Properly speaking, they are not affirmative demands against the Government for damages arising *ex delicto*. The authorities, in which the immunity of the United States from tort actions is asserted, appear to have no real application to these controversies.

The court, in previous decisions, has recognized the liability of the Government to the extent of the value of the property involved, where it has voluntarily submitted itself to the jurisdiction of the court as
p. 463 a plaintiff against such property. *The* | *Siren*, 7 Wall. 152, 154, 159; *Carr* v. *The United States*, 98 U. S. 436, 438; *Clark* v. *Barnard*, 108 U. S. 436, 448; *Cunningham* v. *R. R. Co.*, 109 U. S. 446, 452; *The Nuestra Señora de Regla*, 17 Wall. 29; 108 U. S. 92.

The English courts also recognize the principle that a sovereign

otherwise exempt from suit, may subject itself to judgment in a cross-suit, if it invokes the jurisdiction of the court as a plaintiff. *The Newbattle*, 10 Prob. Div. 33, 35 ; *King of Spain* v. *Hallet*, 2 Bligh (N. S.), 31, 57.

4. No error has been assigned to the decision of the court below in awarding the damages against the United States alone, instead of against it and the naval captors jointly. No application was made to the court below for a decree against the libellant and the naval captors jointly. No such application could, properly, have been made, for the reason that the naval captors did not intervene as co-libellants and join in the prayer for condemnation. The Revised Statutes do not contemplate or permit an intervention of that nature. Rev. Stat. §§ 4630, 4631, 4634.

The only contention presented by the United States attorney on this subject, was that the decree should be against the naval captors alone. There can be no question it would seem, that the court below rightly decided, on the record as it stood, against that contention. The naval captors had, it is true, taken and brought in the vessel ; but their action had been ratified and confirmed by the United States. Under the prize acts, ratification of the captures by the Government, which founded libels thereon, may well be taken as relieving the naval captors from liability, even if they had been before the court as parties. *Lamar* v. *Browne*, 92 U. S. 187 ; *Dobree* v. *Napier*, 2 Bing. N. C. 781. Joint decrees against the libellant and the captors would have been of advantage to these claimants, but as the record stood there appeared to be no ground for asking the court to enter them in that form.

Mr. Justice Holmes delivered the opinion of the court.

These are cases of fishing smacks, which were libelled as | prize of war. p. 464
The proceedings in all the cases are similar and the evidence to a large extent the same. It was decided by this court in two of the cases, *Paquete Habana* and *Lola*, 175 U. S. 677, that smacks of this sort, engaged as these were, in coast-fishing for the daily market, were not liable to capture, and decrees were ordered that the proceeds of the vessels and cargoes be restored to the claimants, with damages and costs. On motion of the United States it was ordered that the decrees be modified so as to direct that the damages should be compensatory only and not punitive. Decrees were entered in each of the above-named cases by the District Court in pursuance of the mandate, and agreements between the United States, the captors and the claimants were filed, that the damages should be charged against the United States or the captors, or apportioned, ' as to justice may appertain and as the legal responsibility therefor may appear ;' saving the right to review the decrees as to amount and as to where the ultimate responsibility rested. The papers do not disclose such an agreement in the *Cuatro de Settembre*, but as the records so far as similar to the first two cases were not printed, we assume that the omission was

only in the index, and that it was understood that this case should stand like the rest. The cases were referred to a commissioner to report the amount of damages. He reported his findings and the evidence. The United States excepted to the findings as excessive. The District Court entered decrees against the United States for the amounts, and the United States appealed on the grounds that the decrees should have gone against the captors and not against the Government, and that the damages were excessive and the exceptions to the commissioner's report should have been sustained.

We do not see how it is possible that a decree should be entered against the captors. There was no formal intervention by them, and whether a decree can be made against the United States or not, it has so far adopted the acts of capture that it would be hard to say that under the circumstances of these cases it has not made those acts its own. It is not disputed that the United States might have ordered the vessels to
p 465 be released. It did not do so. The libels were filed by the United | States on its own behalf, praying a forfeiture to the United States. The statutes in force seemed to contemplate that form of procedure, Rev. Stat. § 4618, and such has been the practice under them. The libels alleged a capture pursuant to instructions from the President. The captures were by superior force, so that there was no question that the United States was interested in the proceeds. Rev. Stat. § 4630. The modification of the decrees in regard to damages, on motion by the United States, imported a recognition of the interest of the United States in that matter, and its submission to the entry of decrees against it. The agreements to which we have referred had a similar import, although they indicated an awakening to a determination to argue the form of the decree. In the case of *Little* v. *Barreme*, 2 Cr. 170, conversely to this, the United States was not a party and the captor was. All that was decided bearing upon the present point was that instructions from the President did not exonerate the captor from liability to a neutral vessel. As to even that the Chief Justice hesitated. But we are not aware that it is disputed that when the act of a public officer is authorized or has been adopted by the sovereign power, whatever the immunities of the sovereign, the agent thereafter cannot be pursued. *Lamar* v. *Browne*, 92 U. S. 187, 199; and as to ratification, *Buron* v. *Denman*, 2 Exch. 167, 187, 189; *Secretary of State in Council of India* v. *Kamachee Boye Sahaba*, 13 Moo. P. C. 22, 86. See *Dempsey* v. *Chambers*, 154 Massachusetts, 330, 332. The principle and authority of *Buron* v. *Denman* was recognized and followed by the Court of Claims in *Wiggins* v. *United States*, 3 C. Cl. 412, 423.

If we are right so far, we think that under the circumstances of this case a decree properly may be entered against the United States. The former decree of this court remains in force and requires a final decree for

damages. *Re Potts*, 166 U. S. 263, 265; *McCormick* v. *Sullivant*, 10 Wheat. 192, 200. The decree must run against the United States if a decree is to be made. In *The Nuestra Señora de Regla*, 108 U. S. 92, 102, the court was of opinion that the United States had submitted to the jurisdiction of the court so far as to warrant the ascertainment of damages according to the rules applicable to private persons in | like cases. It seems to us p. 466
that the facts here are not less strong. Decrees in cases which disclose no special circumstances have been recognized by subsequent statutes providing for their payment. *Glen*, Blatchf. Prize Cases, 375, act of Feb. 13, 1864, c. 10, 13 Stat. 575; *Labuan*, Blatchf. Prize Cases, 165, act of July 7, 1870, c. 220, 16 Stat. 649; *Sybil*, Blatchf. Prize Cases, 615, act of July 8, 1870, c. 231, 16 Stat. 650; *Flying Scud*, 6 Wall. 263, act of July 7, 1870, c. 219, 16 Stat. 649. See also 16 Stat. 650, c. 232; 651, c. 234.

We pass, then, to the other ground of the appeal. With regard to this it is objected that the exceptions to the master's report are not sufficient to open the question; referring to *Commander-in-Chief*, 1 Wall. 43, 50. But the objection being the general one that the evidence did not warrant the finding and all the evidence being attached to the report nothing more is needed.

On the amount of the damages we are of opinion that further proceedings must be had. We do not forget the weight that is given to the findings of a master or commissioner upon matters of fact. But this weight is largely, although not wholly, due to the opportunity, which we do not share, of seeing the witnesses. So far as the commissioner disregarded the testimony of the witnesses whom he saw we should hesitate to overrule his conclusion, although it seems too absolute on the grounds set forth. But the result reached is based on documentary evidence which is before us, and as to which we have equal opportunities for forming a judgment. It appears to us plain that this evidence was given undue weight. The source from which it comes and the high valuations require that it should be taken with considerable reserve. The commissioner had a right, which he seems to have thought that he did not possess, to chancer the estimates. He adopted the owners' prices without qualification. The certificate of the harbor master of Havana is dated November 23, 1898. It does not purport to be a copy of any earlier record. It is true that he makes his valuation as of March 1, 1898, but he does not say either in the certificate or in his testimony that he made that valuation at that or any other date before November 23. We shall not go over the | other evidence in detail. Some at least of the vessels were old. The p. 467
Paquete Habana, for instance, at least eighteen or twenty years. One half interest was bought in 1892 for $2400. She is valued in 1898 by owners, harbor master and commissioner at $4500. The Lola was pur-

chased ' at a cheap price,' according to the owner, in 1887. The valuation of some of the other smacks is above the price said to have been paid for them in earlier years.

In the case of the Espana it appears that she was about fourteen years old, and cost when built ten thousand dollars. She is valued by the owners and harbor master, agreeing as usual, at $9000. The commissioner adopts this valuation. Yet it appears that the vessel was resold to the owners for $2500. Whether this price was a fair value or not, and the owners would not give more, the result of the sale was that they had their boat back again. It is apparent, therefore, that their actual loss was only what they had to pay to get it, the loss from detention of the boat and any wear and tear and changes that it had undergone in the meantime. In a case of the present kind it would be going beyond the requirements of justice into the realm of very doubtful technicalities to disregard the fact that the vessel got back because it was due to a subsequent transaction with a stranger. There is some evidence that the same thing happened in some or all of the other cases. See *The Lively*, 1 Gall. 315, 321.

The fish are allowed for at the highest price in Havana during the blockade, which is too high a rate, and interest was charged at eight per cent, there being no reason apparent for charging more than six if interest was allowed. See *Lincoln* v. *Claflin*, 7 Wall. 132, 139; *The Amalia*, 34 L. J. Adm. 21; *Straker* v. *Hartland*, 2 Hem. & Mil. 570; *Frazer* v. *Bigelow Carpet Co.*, 141 Massachusetts, 126. These are details, but they show what is manifest throughout, that the owners' demands have been accepted without discrimination on evidence which does not justify the result.

We think that we have said enough to show that a revision of the findings is necessary. It seems to us better that this revision should take
p. 468 place in the District Court rather than | be attempted by us. Whether further evidence shall be taken we leave to the parties and to that court.

Decrees reversed and cases remanded for further proceedings in accordance with this opinion.

The Steamship Appam.[1]

(243 U.S. Reports, 124) 1917.

APPEALS FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE EASTERN DISTRICT OF VIRGINIA.

Nos. 650, 722. Argued January 15, 16, 1917.—Decided March 6, 1917.

The British merchant steamship *Appam*, captured on the high seas by a German cruiser and navigated to a port of the United States in control of German officers and crew, during the war between | Great Britain and Germany, is *held* p. 125
to have been brought here as a prize.

Under the principles of international law, as recognized by our government since an early date in its history and as emphasized in its attitude in the Hague Conference of 1907, it is a clear breach of our neutral rights for one of two belligerent governments, with both of which we are at peace, to make use of our ports for the indefinite storing and safe-keeping of prizes captured from its adversary on the high seas.

Failure of our government to issue a proclamation on the subject will not warrant the use of our ports to store prizes indefinitely, and certainly not where the possibility of removal depends upon recruiting crews in violation of our established rules of neutrality.

The Treaty with Prussia of 1799, 8 Stat. 172, 173, Article 19, makes no provision for indefinite stay of vessels, and includes prizes only when in charge of vessels of war.

The violation of neutrality committed by a belligerent in wrongfully making use of one of our ports for storing indefinitely a merchant vessel and cargo captured on the high seas, affords jurisdiction in admiralty to the United States District Court of the locality to seize the vessel and cargo and restore them to their private owners.

In such case, proceedings in a prize court of the belligerent country could not oust the jurisdiction of the District Court having the vessel in custody or defeat its judgment.

234 Fed. Rep. 389, affirmed.

THE case is stated in the opinion.

Mr. Frederick W. Lehmann, with whom *Mr. John W. Clifton, Mr. Norvin R. Lindheim, Mr. Robert M. Hughes* and *Mr. Walter S. Penfield* were on the briefs, for appellants.[2]

The capture of the *Appam* was a lawful act of war, and vested the property in the ship in the German Empire, as between the parties to this suit, since confessedly no property rights of neutrals or of individual captors are | involved. *The Mary Ford,* 3 Dall. 188. As between the p. 126
belligerents, the capture, undoubtedly, produces a complete divestiture of property. *The Adventure,* 8 Cranch, 221, 226; *The Adeline,* 9 Cranch,

[1] The docket titles of these cases are: No. 650, *Hans Berg, Prize Master in charge of the Prize Ship 'Appam,' and L. M. Von Schilling, Vice-Consul of the German Empire, Appellants,* v. *British & African Steam Navigation Co.;* No. 722, *Same* v. *Henry G. Harrison, Master of the Steamship 'Appam.'*

[2] Lack of space prevents a full representation of the interesting arguments made in this case. The reply briefs have suffered especially in the attempt at condensation.

244, 285; *The Astrea*, 1 Wheat. 125; *The Josefa Segunda*, 5 Wheat. 338; *The Sally Magee*, 3 Wall. 451; *The Nassau*, 4 Wall. 635; *Manila Prize Cases*, 188 U. S. 254; Westlake, International Law, vol. 2, 2d ed., p. 309; Wheaton, Maritime Captures and Prizes, c. 9, § 5, p. 259; Mr. Lansing to the English Ambassador, March 13, 1915, Diplomatic Correspondence, European War, Department of State, No. 2, p. 140. The property of a neutral is of course not divested until sentence of condemnation. *Hudson* v. *Guestier*, 4 Cranch, 293, 295.

That jurisdiction of prize cases is vested exclusively in the courts of the captor government, and that the mere entry of a prize into neutral waters is not necessarily a breach of neutrality, are propositions conceded by the appellees.

It is not essential to the jurisdiction of the courts of the captor country that the prize be brought into one of its ports. *Hudson* v. *Guestier, supra; Jecker* v. *Montgomery*, 13 How. 498, 515. The courts of the neutral country may inquire whether the vessel is held as a prize of war, or whether her taking was a violation of the neutrality of their country, but no further. *The Alerta*, 9 Cranch, 359; *The Betsey*, 3 Dall. 6; *The Invincible*, 13 Fed. Cas. 72; *The Invincible*, 1 Wheat. 238. Under all the decisions of this court, when the *Appam* was found to be a prize of war, the libel should have been dismissed, unless it was further found that in the circumstances of the capture itself there was a violation of our neutrality.

Bringing the *Appam* into our waters did not authorize restitution to the original British owners. The breach of neutrality which will forfeit a prize of war must be one which invalidates the capture itself, which
p. 127 involves | the neutral nation as a participant in the act of war committed in taking the prize. If the capture is made in the neutral waters and the prize is brought within the jurisdiction of the sovereign whose neutrality has been violated, restitution will be decreed, because the capture was an act of trespass upon the sovereignty of the neutral power, and moreover, a violation of the shelter and asylum which the captured vessel had a right to expect in the neutral waters.

And of like nature is the case where the captor ship has been equipped, or its equipment has been augmented, within the neutral territory. Bringing the vessel in is not the foundation of the right to redress, it simply gives opportunity to award and enforce redress. The exceptions to the rule as to the exclusive cognizance of prize cases by the courts of the captor country have never been extended to cases of alleged violation of neutrality after the capture, and not inherent in the capture. The policy of our government was fixed and made public during the administration of Washington, and has been adhered to ever since, and the decisions of this court are in perfect harmony with that policy. See

Jefferson to British Minister, 1793, 4 Jefferson's Works, H. A. Washington ed., p. 78; Washington to Congress, 1793, 1 Am. State Papers, p. 21; *Talbot* v. *Jansen*, 3 Dall. 133; *The Alerta, supra*, 359; *The Invincible*, 1 Wheat. 238; *The Divina Pastora*, 4 Wheat. 52; *The Estrella*, 4 Wheat. 298; *The Neustra Senora de la Caridad*, 4 Wheat. 497; *La Amistad de Rues*, 5 Wheat. 385; *La Conception*, 6 Wheat. 235; *The Santissima Trinidad*, 7 Wheat. 283; *The Gran Para*, 7 Wheat. 471; *The Santa Maria*, 7 Wheat. 490; *The Monte Allegre*, 7 Wheat. 520.

Where, as in this case, the capture was a valid act of war, made under the commission of a belligerent power on the high seas, and the capture is complete, the crew of the captured ship submitting to the control of the captors, | and there remains nothing but the hope of recap- p. 128
ture, a hope that is not realized, the captured ship is good prize and is the property of the captor government, as much so as are its ships of war, and what its rights or privileges in our ports may be, how long it may stay, or whether it may come into them at all, are questions between our government and the government of the captors, and do not at all concern the original owner of the captured ship. He has not been injured, he has lost nothing by such acts. See *The Anne*, 3 Wheat. 435; *The Sir William Peel*, 5 Wall. 517; *The Adela*, 6 Wall. 266; *The Florida*, 101 U. S. 37; *Queen* v. *The Chesapeake*, 1 Oldright (Nova Scotia), 797; *Williams* v. *Armroyd*, 7 Cranch, 423.

The *Appam* is a public ship of the German Empire, and entitled to all the rights and immunities of such a ship. As the property of the German Government the ship was public property—a public ship—and could be nothing else. That government might devote her to any use it deemed proper or might destroy her altogether. A ship may be a public ship without being a ship of war. Hall, International Law, 5th ed., p. 161. The Government of the United States in this war has announced its intention to treat a prize as a public vessel. Neutrality Proclamation *re* Panama Canal, November 13, 1914, Diplomatic Correspondence, European War, Department of State, No. 2, pp. 18, 19. Our ports are open to the public ships of friendly powers, and they may remain while our government allows. *The Exchange*, 7 Cranch, 116. Their exemption from the jurisdiction of our courts depends rather upon their public than upon their military character. *Briggs* v. *Light Boats*, 11 Allen, 157, 186. The general practice of our government has been in harmony with the views we present. John Paul Jones to Robert Morris, 1783, 7 Diplomatic Correspondence of the United States, p. 288; Franklin to Danish Minister, 3 Wharton, | Diplomatic Correspondence of p. 129
the American Revolution, p. 433; Franklin to Jones, 1785, 7 Diplomatic Correspondence of the United States, p. 341; Resolution of Congress of Confederation, October 25, 1787, *id.*, p. 362; Jefferson to Danish

Secretary, 1788, 6 Jefferson's Works, Monticello ed., p. 414; Jefferson to British Minister, 1793, 1 Am. State Papers, Foreign Relations, p. 176; 4 Jefferson's Works, H. A. Washington ed., p. 65; Moore's International Law Digest, vol. 7, p. 983; Wheaton to Prussian Minister, 1843, *id.*, p. 982; Cushing to Marcy, 7 Ops. Atty. Gen. 122, 125, 129, 131; Semmes' Correspondence with British authorities, 1864, Semmes' Service Afloat, pp. 663, 741, 743.

In the treaties with Prussia, 1785 and 1799, Art. XIX, the purpose of each party was to obtain shelter for its warships and prizes in the ports of the other. The right of prizes to come into port and their immunity while there constitute the substance of the article, not the manner of coming in or going out. They may 'come and enter,' and may be 'carried out again' at any time. The common and proper use of the word 'carry' includes the ideas of *sending* and *bringing*. In *The Felicity*, 2 Dods. 281; *s. c.*, 2 Roscoe's Prize Cases, 233, Sir William Scott used *carry* and *bring* interchangeably. A prize may be brought into port by a prize crew as well as under convoy. *The Alexander*, 8 Cranch, 169; *The Eleanor*, 2 Wheat. 345. The bringing in either case is the act of the captor. In all the correspondence leading up to these treaties we have seen nothing to suggest that on either side it was deemed material whether a prize was brought in alone, by the prize crew, or whether it was brought in by the captor vessel. Everything indicates that it was all one to the parties how the prize got into port so long as it got there. And our commissioners abroad used the words *carry* and *send* indifferently to describe the taking of a prize into port, whether with or without
p. 130 convoy. Franklin to Vergennes, | concerning the prizes 'sent to Bergen,' 1782, 7 Franklin's Works, (ed. John Bigelow), p. 397. In a minute of their proceedings, as ministers plenipotentiary on August 30, 1784, Franklin, Adams, and Jefferson speak of these prizes as taken by Jones and '*carried* into Bergen.' 2 Diplomatic Correspondence of the United States, p. 196. Jones himself in a letter to the Marechal de Castries, of February 18, 1784, speaks of them as '*sent* into port.' 7 Diplomatic Correspondence of the United States, p. 294. See also Franklin to Jones, 1778, 1 Sparks' Diplomatic Correspondence, American Revolution, p. 361; Jefferson to Baron de Blome, 1786, 2 Jefferson's Works, (ed. H. A. Washington), p. 13; Order of Congress, 1787, 7 Diplomatic Correspondence of the United States, p. 364; Act of March 28, 1806, 6 Stat. 61. The treaty is to be construed in view of the circumstances and conditions which prompted to its adoption. Vattel, Book II, c. 17, § 287; *Hauenstein* v. *Lynham*, 100 U. S. 483; *Tucker* v. *Alexandroff*, 183 U. S. 424. The arrangement with Prussia originated while we were at war with England, and anxious to war on British shipping and safeguard prizes. Prussia had no navy or large maritime interests. The

treaty was made out of friendship to this country and at its earnest solicitation. The similar treaty with France of February 6, 1778, Art. XVII, Molloy, vol. 1, p. 474, actuated by the same motive, was construed as allowing prizes to be sent in without convoys. Franklin to Jones, 1779, Senate Reports, 63, 29th Cong., 2d sess., p. 5; Hamilton to Collectors of Customs, 1793, 1 Am. State Papers, Foreign Relations, p. 140; Jefferson's opinion, 6 Jefferson's Writings, p. 223; Jefferson to Genet, *re The Fanny*, 1793, l. c. 329, note. See also questions and opinion formulated by Jefferson for the Cabinet, 1793, l. c. 351, 370, and his letters to Morris and the British Minister, same year, l. c. 383, 423, 444. See further Washington's Message of December 3, 1793, 1 Messages of the Presidents (Richardson), | p. 139; *Solderondo* v. *The* p. 131
Nostra Signora, 21 Fed. Cas. 225; *Reid* v. *Vere*, 20 Fed. Cas. 488. See the treaties of like purpose and effect with *The Netherlands*, October 8, 1782, Molloy, vol. 2, pp. 1238, 1239; 3 Wharton, International Law, p. 527; and with Sweden, April 3, 1783, Molloy, vol. 2, p. 1732, the latter taken as a model by Prussia. 8 Works of John Adams, pp. 191, 193. Further as to the purpose and history of the Prussian Treaty: Franklin and Deane to Continental Congress, 1777, 2 Wharton, Diplomatic Correspondence, American Revolution, p. 322; Lee's letter from Berlin, 1777, 2 Sparks' Diplomatic Correspondence, American Revolution, p. 88; Baron Schulenburg to Lee, 1778, 2 Wharton, Diplomatic Correspondence, American Revolution, p. 472; Adams, Franklin and Jefferson to Baron Thulemeier, 1785, 2 Diplomatic Correspondence of the United States, p. 276; the latter's reply, 1785, l. c. 304; Washington to Rochambeau, 1786, 9 Sparks' Writings of Washington, pp. 182, 183; Hamilton, 1795, 5 Hamilton's Works (ed. Henry Cabot Lodge), p. 113.

Article XIX of the first Prussian Treaty, modified in 1799, was revived by the Treaty of 1828, excluding the provision which related to prizes made on British subjects. The letters exchanged March 31 and April 4, 1916, between the British Ambassador and the Secretary of State (Diplomatic Correspondence, European War, Department of State, No. 3, pp. 341 *et seq.*), show a definite ruling by our political department that the presence of the *Appam* in our waters did not violate neutrality. The treaty, as re-enacted in 1828, is undoubtedly still in force.

The municipal law of the United States is in accord with international law as declared by this court. 35 Stat. 1090, 1091; Fenwick, Neutrality Laws of the United States, c. 2, p. 26; 1 Am. State Papers, p. 140. |

The neutrality proclamations of the United States are in accord with p. 132
its municipal law and with general international law. Having failed to interdict the entrance of prizes into our ports, permission to enter must be assumed. Our traditional policy, differing from that of Europe,

but adhered to in this war and throughout our history, is not to forbid asylum for prizes. Montague Bernard's Neutrality of Great Britain during the American Civil War (London, 1870), pp. 133, 145 *et seq.*

It has consistently been held, that in the absence of express prohibition, prizes may enter and remain in neutral ports. 7 Ops. Atty. Gen. 122; Moore's International Law Digest, vol. 7, p. 982; Twiss, Law of Nations, 2d ed., vol. 2, pp. 453, 454; Hall, International Law, 5th ed., p. 618; Halleck, International Law, 1st ed., p. 523; Calvo, Le Droit International Theorique et Pratique, 3d ed. (1880), vol. 3, p. 498; *The Exchange*, 7 Cranch, 116.

The questions at issue are not affected by the provisions of the Hague Convention. The Hague Conventions do not necessarily declare existing law, they may change it. Scott's Texts of Hague Peace Conferences, 1899–1907, Intro., pp. ix, xix; Preamble to Convention XIII, Scott's Hague Peace Conferences, vol. 2, p. 507. Expressly, these rules are subject to existing treaties. They apply only if all belligerents are parties to the Convention. Article 28, *id.*, p. 519. Great Britain and Turkey have not ratified; Convention XIII therefore does not apply. *The Farn Case*, Mr. Lansing to British Ambassador, Diplomatic Correspondence, European War, Department of State, No. 2, p. 140. The convention may not be taken as evidence in the face of the consistent policy of this country maintained by all branches of its government and never reversed. Besides, the Convention, taken literally, does not deny permission to enter, and no penalty could fall, under Art. 21, until after notice, which has never been given. |

p. 133 *Mr. Frederic R. Coudert* and *Mr. James K. Symmers*, with whom *Mr. Howard Thayer Kingsbury*, *Mr. Herbert Barry*, *Mr. Floyd Hughes*, *Mr. Ralph James M. Bullowa* and *Mr. Munroe Smith* were on the briefs, for appellees:

Unless they are expressly excluded, prizes may seek temporary shelter in a neutral port, but not permanent or indefinite asylum. This rule is the product of a long course of historical development in the various maritime countries. French Ordinances of 1543, 1674 and 1689; French Prize Code of 1784. See Naval War College, International Law Situations, 1908, p. 54, and appendix to 5 Wheaton, 52–58. In 1650, and again in 1681, France prohibited the stay of foreign prizes in her ports for more than twenty-four hours. Pistoye & Duverdy, Traité des Prises Maritimes, vol. 2, pp. 449, 452. This is, perhaps, the origin of the twenty-four hour limitation for belligerent war vessels in neutral ports. Edict of the States General of Holland of November 7, 1658, in note to *The Josefa Segunda*, 5 Wheat. 349, citing Duponceau's Translation of Bynkershoek. The English authorities recognize the same general rule. *The Flad Oyen*, 1 C. Rob. 135; *The Henrick and Maria*,

4 C. Rob. 43 ; *The Polka*, Spinks, Ecclesiastical and Admiralty Reports, p. 447. The German Prize Code expressly recognizes it, Huberich & King, pp. 64, 65. There is a striking agreement of opinion among the leading text-writers. Wheaton's Treatise on Capture (1815), pp. 262, 263 ; Wheaton, International Law, 8th Am. ed., § 391, note ; Hall, International Law, 5th ed., p. 618 ; Westlake, International Law, part 2, p. 215 ; Risley, The Law of War, p. 176 ; Dr. James Brown Scott, in American Journal of International Law, January, 1916, pp. 104–112 ; Bluntschli, International Law, § 778, note.

During our Civil War, our War with Spain, and in the Russo-Japanese War, neutral nations generally either excluded prizes or allowed only temporary entrance in cases | of necessity. Bernard's History of British p. 134
Neutrality, pp. 137–141 ; Naval War College, International Law Situations, 1908, pp. 70–73 ; American Journal of International Law, January, 1916, pp. 109 *et seq.*

The provisions of Arts. 21 and 22 of Convention XIII of the Hague Conference of 1907 are declaratory of the existing law of nations. The express refusal of the United States to accede to Art. 23 was notice to the world that this country would not allow the sequestration of prizes in our ports. The policy of the United States, as well as that of Great Britain, is clearly shown by Arts. 21 and 22 which were signed, adhered to or ratified by forty-three of the powers. This is indicative of the very general agreement among the nations that these articles declared existing international law. The German Prize Code is equally convincing.

Article 23 is evidently inconsistent with Arts. 21 and 22 and contrary to the general rule of neutrality and the modern practice developed by the nations. The attitude of the United States in its reservation indicates its disavowal of the proposed innovation. In the proceedings of the Convention that article was decided upon as a compromise measure. While all agreed on 21 and 22 as expressing existing law, Art. 23 was debated as an innovation, and from the standpoint of policy. These debates disclose the fact that Great Britain and the United States stood for the codification of existing international law as finally embodied in 21 and 22 ; Germany also acquiesced, proposing to add to the original draft of Art. 21 the words : ' for lack of provisions or fuel.' This amendment was accepted. The German delegation evidently followed the view of their government as now embodied in their present Prize Code.

The adhesion of the United States to Arts. 21 and 22 was clearly no accidental compromise, but was done in pursuance of the fixed policy of this country and that | of other nations, as shown by their definitely p. 135
proclaimed practice, at least since the middle of the nineteenth century. As pointed out in Oppenheim on International Law, vol. 2, pp. 395–397, only by adhering to this practice can neutrality be preserved.

After the termination of the Revolutionary War and as a consequence of our Treaties with France of 1778, numerous and protracted difficulties arose in regard to the bringing by French vessels into American ports of prizes. At that time it was permissible to give to one power or another certain privileges available in wartime. In discussing these treaties it must be remembered that the evolution of the law of neutrality, which has taken place since, especially as a consequence of these exclusive privileges given by the United States to France, wholly negatives this ancient view. The fundamental postulate of neutrality to-day is complete impartiality between the belligerents. This rule, embodied in the original statutes of the United States, and since so firmly adhered to, is not founded upon 'bookish theoric' but is the resultant of painful national experience. McMaster's History of the People of the United States, vol. 2, pp. 103, 136; *Gray* v. *United States*, 21 Ct. Clms. 340, 360, 384; Moore on International Arbitrations, vol. 4, p. 3967.

The first act in the drama was Washington's proclamation of neutrality. The difficulty in maintaining it was largely due to the embarrassing position in which the United States was involved by having accorded to France exclusive treaty privileges, and especially the provision allowing such use of its ports as was necessarily incompatible with impartiality. *Id.*, pp. 3970–3977; *The Betsey*, 3 Dall. 6; *The Vrow Christina Magdalena*, Bee, 11, Fed. Cas. No. 7216. The case of *The Betsey* not only overruled all the decisions of the lower courts refusing jurisdiction in this class of cases, but established at that early
p. 136 date (1794) the proposition that the courts of the United | States had power to enforce and vindicate international law. The French treaty clause was in vain invoked as excluding the jurisdiction of the court, precisely as the claimants here invoke the similar Prussian treaty clause.

The decision in the *Betsey Case* was followed on June 5, 1794, by the Neutrality Act, which, with some additions, has remained the law up to the present time. This act sought to meet the difficulties that had arisen out of the great European struggle and had for its object the declaration and codification of the policy followed by Washington and Jefferson and based by them upon the law of nations.

The construction placed by the executive upon the clauses allowing prizes to be taken into American ports, as set forth in Mr. Jefferson's letter to Gallatin, August 28, 1801, Moore's International Law Digest, vol. 7, § 1302, pp. 935, 936, and again by Mr. Pickering, Secretary of State, in 1796, *id.*, 936, make it apparent that under the interpretation placed upon the clause of the French treaty, similar to that of the Prussian treaty, now in question, little more was granted to the vessel and her prize than would now be allowed under the law as declared by Art. 21 of the Hague Convention XIII. It is idle to endeavor now to interpret

the Prussian treaty by reference to the letters *inter sese* of the distinguished Americans who were engaged in the effort to persuade Prussia to make it.

War vessels with or without prizes might have been absolutely excluded from our ports ; by treaties with some nations we allowed them temporary shelter. We refused to consider this temporary shelter as an asylum, and the treaties, even where applicable, were thus interpreted in a fashion not inconsistent with fair neutrality. Attorney General Wirt, 2 Ops. Atty. Gen. 86 ; Attorney General Cushing, 7 Ops. Atty. Gen. 212 ; Clay, Secretary of State, Moore's International Law Digest, vol. 7, p. 937 ; | Mr. Seward to Peruvian Legation, *id.*, p. 938 ; p. 137
Attorney General Cushing, 7 Ops. Atty. Gen. 122. For the so-called Bergen prizes, see Moore's International Law Digest, § 1314 ; Act of March 28, 1806, 6 Stat. 61. The prizes were brought into Bergen under stress of weather and for necessary repairs. No precedent was created except one against the right of asylum.

There are certain other early treaties which show that, where it was intended to give or secure any greater privileges than those clearly expressed in the Prussian treaty, appropriate language was used. Treaty with Algiers, 1798, Arts. IX, X ; Treaty with Algiers, 1816, Art. XVIII ; Treaty with The Netherlands, 1782, Art. V ; Treaty with Sweden, 1783, Arts. XVIII, XIX. See summary of treaties in regard to prizes in neutral ports in Phillimore's International Law, vol. 3, § 380.

The courts of admiralty of a neutral country have jurisdiction of a suit by the owner of a prize which has been brought into a port of the neutral, and may award restitution when there has been a violation of neutrality on the part of the captor, whether inherent in the capture, or prior or subsequent thereto. *Palachi's Case*, 1 Rolle, 175, 3 Bulstrode, 27 ; Lex Mercatoria (London, 1729), p. 179 ; Molloy's De Jure Maritimo, vol. 1, pp. 14, 15, 58 ; Laws of the Admiralty (London, 1767), vol. 1, p. 219 ; *The Betsey*, 3 Dall. 6 ; *The Santissima Trinidad*, 1 Brock. 478, Fed. Cas. No. 2568 ; affirmed in 7 Wheat. 283 ; *The Exchange*, 7 Cranch, 116 ; *The Invincible*, 1 Wheat. 238 ; *The Divina Pastora*, 4 Wheat. 52 ; *The Estrella*, 4 Wheat. 298 ; *La Amistad de Rues*, 5 Wheat. 385 ; *The Arrogante Barcelones*, 7 Wheat. 496 ; and other cases. *Queen* v. *The Chesapeake*, 1 Oldright (Nova Scotia), 797 ; *La Reine des Anges*, Stewart's Admiralty Rep. (Nova Scotia), 11 ; *The Purissima Concepcion*, 6 Rob. 45 ; *The Vrow Anna Catharine*, 5 Rob. 15 ; *The Eliza Ann*, 1 Dods. 244 ; *The Diligentia*, 1 Dods. 404 ; *The Twee Gebroeders*, | 3 Rob. 161 ; p. 138
The Anna, 5 Rob. 373 ; *The Sir William Peel*, 5 Wall. 517 ; *The Florida*, 101 U. S. 37.

In the case at bar the violation of neutrality was subsequent to the act of capture and was a deliberate attempt to use an American port as a naval base for the safekeeping of the prize during the war. The time

of the violation of neutrality is immaterial; there has been a violation and the prize has been voluntarily brought within the jurisdiction of the American courts. The power and duty to make restitution follow as a matter of course.

The Prussian treaties of 1799 and 1828 do not apply. Examination of the French and English texts shows that these and the contemporary treaties with Sweden, France and England, apply only to prizes which are brought into port by vessels of war. They constitute exceptions and necessitate strict construction. They contemplate merely a temporary stay for some particular necessity and do not permit a neutral port of refuge to be made a port of ultimate destination or of indefinite asylum. Opinion of Secretary of State, March 2, 1916. The French text of the Prussian Treaty of 1799 is free from the ambiguity that appellants impute to the English. Appellants' historical review of the negotiations for the treaty actually militates against their own contentions. The convoy of a war vessel to protect its prizes was insisted upon as essential because, as the Prussian sovereign pointed out, some of his principal ports were not fortified, and he therefore could not protect a prize which came in for shelter without a war vessel to defend it against hostile attack.

The German ambassador expressly admitted in his memorandum for the State Department that the Prussian Treaty of 1799 'made it necessary that the prize was brought into port by the capturing vessel,' and contended for a wider application in view of 'the development of modern cruiser warfare.'

p. 139 Complete title to a prize, whether neutral or belligerent, | does not fully vest in the captor until the prize has been brought into one of the captor's ports and duly condemned by a competent prize court of the captor's country. Until then the prize may be lost by recapture, abandonment or violation of another nation's neutrality. Prior to such condemnation the captor has merely a right *ad rem* and no right *in re*; in other words, merely that limited right which possession gives until by condemnation *dominium* or plenary title is acquired. Amos, Roman Civil Law, pp. 157, 158. There is considerable diversity among the early authorities on this question. Grotius, Liber 3, c. 6, § 3, note 3; Bynkershoek's Treatise on the Law of War, Du Ponceau's Translation, c. 5, p. 41; Burlamaqui, Principles of Politic Law, Part 4, c. 7, §§ 15–18; Richard Lee, Treatise of Captures in War, pp. 82, 96; *Goss* v. *Withers*, 2 Burrow's Rep. 638; *Assievedo* v. *Cambridge*, 10 Mod. 77; March's New Cases, p. 110; Wooddeson's Lectures, vol. 2, p. 274; *The Flad Oyen*, 1 C. Rob. 135.

The American rule requires that the captured vessel be brought within the jurisdiction of the captor's country in order to divest the title of the original owners, and that a sentence of condemnation be duly

pronounced by a competent court. Attorney General Lee, 1 Ops. Atty. Gen. 78; *Stewart* v. *United States*, 1 Ct. Clms. 113, 119; *Manila Prize Cases*, 188 U. S. 254, 260, 278. See also *Miller* v. *The Resolution*, 2 Dall. 1; *The Nassau*, 4 Wall. 634, 641.

It seems clear from the language of *The Adventure*, 8 Cranch, 221, that, even assuming that the capture, of itself, divested their property, leaving only a *spes recuperandi*, all the rights of the British owners were revived the moment the *Appam* was brought by the prize-master into our neutral waters.

Leading French, German and English commentaries are in agreement that until condemnation the original owner's rights are never finally extinguished but merely | remain in abeyance. Bluntschli, International p. 140
Law Codified, paragraphs 739, 740, 741, 860; Bonfils, Manuel de Droit International Public (Paris, 1914), paragraphs 1416, 1420; Wheaton, International Law (Phillipson, 1916), p. 581; Oppenheim, International Law, vol. 2, § 196; Upton, Maritime Warfare and Prize (1861); Rev. Stats., § 4652; *Oakes* v. *United States*, 30 Ct. Clms. 378; *The Star*, 3 Wheat. 86; *The Beaver*, 3 C. Rob. 292; 'The Emily St. Pierre' and 'The Experience,' Dana's notes to Wheaton, pp. 474, 475; U. S. Diplomatic Correspondence, 1862, pp. 75–148. See Pitt Cobbett, Leading Cases on International Law (1913), pp. 204, 205.

In any event, as held in the case of *The Santissima Trinidad*, 7 Wheat. 355, the pendency of prize proceedings in a foreign court cannot be set up against the jurisdiction of our courts to deal with a *res* actually in their custody. The case of *The Mary Ford*, 3 Dall. 188, is not a controlling authority. This decision was rendered in 1794, when the whole law of prize was in a very unsettled condition. The conclusion reached is entirely inconsistent with the later decision in the case of *The Adventure, supra.*

The *Appam* is not a German public vessel or entitled to the exemptions of a public vessel. An uncondemned prize stands in a category by herself. She may, after condemnation, be sold to a private purchaser and become a private vessel under new ownership, or she may be appropriated to public uses, pacific or belligerent. She may, in certain exceptional cases, be converted into a public vessel even before condemnation. But to effect this she must be regularly commissioned as such by some competent authority. She may then become entitled to the exemptions of a public vessel. *The Exchange*, 7 Cranch, 116. As to the case of *The Farn*, see Diplomatic Correspondence, European War, Department of State, No. 2, pp. 139, 140. *The Tuscaloosa* was restored expressly on the ground that she had been commissioned as a ship of | war, p. 141
and converted into a tender to the *Alabama*. Semmes, Memoirs of Service Afloat, pp. 739–743; Molloy, Treaties, &c., 1776–1909, vol. 1, p. 721.

Nothing whatever has been done to take the *Appam* out of the category of prize, and convert her into a public vessel, or devote her to public use. She would not, as a German public vessel, bring several hundred prisoners to the United States for the purpose of setting them free. She could not bring them here to hold them as prisoners in our waters without manifestly violating our neutrality, as she in fact did in this respect, and the express prohibition of the American statutes. Rev. Stats., § 5286. The neutrality regulations applicable to the Panama Canal Zone, referred to by appellants, merely provide that in passing through the Canal prizes shall be subject to the same restrictions as war vessels. This does not constitute a recognition of prizes as public vessels. Moreover, such use of the Canal is necessarily temporary.

The sending of a prize to a neutral port with a prize crew insufficient to navigate her, and with intention to lay her up, is equivalent to an abandonment and thereby divests the captors' inchoate right. To hold a capture merely by putting on board a prize-master, with or without a small crew, the prize-master must actually bring the prize into a home port for condemnation. *The Alexander*, 8 Cranch, 169; *Wilcocks* v. *Union Ins. Co.*, 2 Binney, 574, 578; Attorney General Grundy, 3 Ops. Atty. Gen. 377.

Under the prize laws of the United States, the failure to bring proceedings with due diligence in a competent court for an adjudication of prize is in itself ground for the release of the vessel. Rev. Stats., § 2645.

In like manner, the German Prize Code provides for the bringing of proceedings for condemnation in due season. Here the *res* is in the custody of our court, and the pendency of proceedings in a German
p. 142 prize court is | mere *brutum fulmen*, under the decision in *The Santissima Trinidad*, 7 Wheat. 355.

Restitution to the owner is the appropriate and only adequate remedy. The inquiry to be made by our courts is whether the prize was brought in for permitted purposes, and, if so, whether she remains longer than her necessities require. If she acts otherwise, then she is, in the language of the Hague Convention, to be 'released.' If released, she must necessarily revert to her owners, since the temporary adverse possession of the captors is thus removed. This, however, was no new invention of the Hague Conference. Its roots go back at least to the Edict of the States General of Holland of 1658, already cited, which expressly provided that, in such event:

'The prize should be restored to the former owners as though it had never been taken.' Consolato del Mare, Benedict's Admiralty, § 119. See Diplomatic Correspondence, European War, Department of State, No. 2, p. 141. If internment were the only remedy, the captor's chief

purpose, of securing a place of safe-keeping for his spoils, would be accomplished. Moreover, the German Government has expressly disclaimed and objected to internment in this case.

That restitution is made by court decree rather than by executive action is the result of the historic development of our judicial and diplomatic precedents. The remedies are concurrent; but for many years it has been the policy of this government to leave such questions to the courts rather than to dispose of them summarily by executive action. (See Chief Justice Marshall's opinion, in the Circuit Court in *The Santissima Trinidad, supra.*)

MR. JUSTICE DAY delivered the opinion of the court.

These are appeals from the District Court of the United States for the Eastern District of Virginia, in two admiralty | cases. No. 650 was p. 143
brought by the British & African Steam Navigation Company, Limited, owner of the British steamship, *Appam*, to recover possession of that vessel. No. 722 was a suit by the master of the *Appam* to recover possession of the cargo. In each of the cases the decree was in favor of the libellant.

The facts are not in dispute and from them it appears: That during the existence of the present war between Great Britain and Germany, on the fifteenth day of January, 1916, the steamship *Appam* was captured on the high seas by the German cruiser, *Moewe*. The *Appam* was a ship under the British flag, registered as an English vessel, and is a modern cargo and passenger steamship of 7800 tons burden. At the time of her capture she was returning from the West Coast of Africa to Liverpool, carrying a general cargo of cocoa beans, palm oil, kernels, tin, maize, sixteen boxes of specie, and some other articles. At the West African port she took on 170 passengers, eight of whom were military prisoners of the English Government. She had a crew of 160 or thereabouts, and carried a three-pound gun at the stern. The *Appam* was brought to by a shot across her bows from the *Moewe*, when about a hundred yards away, and was boarded without resistance by an armed crew from the *Moewe*. This crew brought with them two bombs, one of which was slung over the bow and the other over the stern of the *Appam*. An officer from the *Moewe* said to the captain of the *Appam* that he was sorry he had to take his ship, asked him how many passengers he had, what cargo, whether he had any specie, and how much coal. When the shot was fired across the bows of the *Appam*, the captain instructed the wireless operator not to touch the wireless instrument, and his officers not to le. any one touch the gun on board. The officers and crew of the *Appam*, with the exception of the engine-room force, thirty-five in number, and the second officer, were ordered | on board the *Moewe*. The captain, p. 144
officers and crew of the *Appam* were sent below, where they were held

until the evening of the seventeenth of January, when they and about 150 others, officers and crews of certain vessels previously sunk by the *Moewe*, were ordered back to the *Appam* and kept there as prisoners. At the time of the capture, the senior officer of the boarding party told the chief engineer of the *Appam* he was now a member of the German navy; if he did not obey orders his brains would be blown out, but if he obeyed, not a hair of his head should be touched. The *Appam's* officer was instructed to tell his staff the same thing, and if they did not obey orders they would be brought to the German officer and shot. Inquiries were made by the German officer in command of the *Appam* as to revolutions of the engines, the quantity of coal on hand and the coal consumption for different speeds, and instructions were given that steam be kept up handy, and afterwards the engineer was directed to set the engines at the revolutions required, and the ship got under way.

Lieutenant Berg, who was the German officer in command of the *Appam* after its capture, told the engineer on the second morning that he was then in charge of the ship, asked of him information as to fuel consumption, and said that he expected the engineer to help him all he could, and the more he did for him the better it would be for everybody on the ship. The engineer said he would, and did so. The engines were operated with a bomb secured to the port main injector valve, and a German sailor stationed alongside the bomb with a revolver. There was a guard below of four or five armed Germans, who were relieved from time to time, but did not interfere with the working of the ship. The German officer, Lieutenant Berg, gave directions as to working the engines, and was the only officer on board who wore a uniform. |

p. 145 On the night of the capture, the specie in the specie-room was taken on board the *Moewe*. After Lieutenant Berg took charge of the *Appam*, bombs were slung over her bow and stern, one large bomb, said to contain about two hundred pounds of explosive, was placed on the bridge, and several smaller ones in the chart room. Lieutenant Berg informed the captain of the *Appam*, pointing to one of the bombs, 'That is a bomb; if there is any trouble, mutiny, or attempt to take the ship, I have orders to blow up the ship instantly.' He also said, 'There are other bombs about the ship; I do not want to use them, but I shall be compelled to if there is any trouble.' The bombs were kept in the positions stated until the ship arrived at the Virginia Capes, when they were removed. Lieutenant Berg, on reaching Hampton Roads, asked the crew of the *Appam* to drop the anchor, as he had not men to do it.

During the trip to the westward, the officers and crew of the *Appam* were not allowed to see the ship's compass to ascertain her course, and all lights were obscured during the voyage. The German prisoners, with the exception of two who went on board the *Moewe*, were armed

and placed over the passengers and crew of the *Appam* as a guard all the way across. For two days after the capture, the *Appam* remained in the vicinity of the *Moewe*, and then was started westward. Her course for the first two or three days was southwesterly, and afterwards westerly, and was continued until her arrival at the Virginia Capes on the thirty-first of January. The engine-room staff of the *Appam* was on duty operating the vessel across to the United States; the deck crew of the *Appam* kept the ship clean, and the navigation was conducted entirely by the Germans, the lookouts being mostly German prisoners.

At the time of the capture, the *Appam* was approximately distant 1,590 miles from Emden, the nearest German port; from the nearest available port, namely, | Punchello, in the Madeiras, 130 miles; from p. 146
Liverpool, 1,450 miles; and from Hampton Roads, 3,051 miles. The *Appam* was found to be in first class order, sea-worthy, with plenty of provisions, both when captured and at the time of her arrival in Hampton Roads.

The order or commission delivered to Lieutenant Berg by the commander of the *Moewe* is as follows:

'Information for the American Authorities. The bearer of this, Lieutenant of the Naval Reserve Berg, is appointed by me to the command of the captured English steamer "Appam," and has orders to bring this ship into the nearest American harbor, and there to lay up. Kommando S. M. H. Moewe. Count Zu Dohna, *Cruiser Captain and Commander*. (Imperial Navy Stamp:) Kommando S. M. H. Moewe.'

Upon arrival in Hampton Roads, Lieutenant Berg reported his arrival to the Collector, and filed a copy of his instructions to bring the *Appam* into the nearest American port and there to lay up.

On February 2d, His Excellency, the German Ambassador, informed the State Department of the intention, under alleged treaty rights, to stay in an American port until further notice, and requested that the crew of the *Appam* be detained in the United States for the remainder of the war.

The prisoners brought in by the *Appam* were released by order of the American Government.

On February 16th, and sixteen days after the arrival of the *Appam* in Hampton Roads, the owner of the *Appam* filed the libel in case No. 650, to which answer was filed on March 3d. On March 7th, by leave of court, an amended libel was filed, by which the libellant sought to recover the *Appam* upon the claim that holding and detaining the vessel in American waters was in violation of the law of nations and the laws of the United States and of the neutrality of the United States. The answer of the | respondents to the amended libel alleged that the *Appam* p. 147
was brought in as a prize by a prize master, in reliance upon the Treaty

of 1799 between the United States and Prussia; that by the general principles of international law the prize master was entitled to bring his ship into the neutral port under these circumstances, and that the length of stay was not a matter for judicial determination; and that proceedings had been instituted in a proper prize court of competent jurisdiction in Germany for the condemnation of the *Appam* as a prize of war; and averred that the American court had no jurisdiction.

The libel against the *Appam's* cargo was filed on March 13th, 1916, and answer filed on March 31st. During the progress of the case, libellant moved the court to sell a part of the cargo as perishable; on motion the court appointed surveyors, who examined the cargo and reported that the parts so designated as perishable should be sold; upon their report orders of sale were entered, under which such perishable parts were sold, and the proceeds of that sale, amounting to over $600,000, are now in the registry of the court, and the unsold portions of the cargo are now in the custody of the marshal of the Eastern District of Virginia.

The argument in this case has taken wide range, and orally and in printed briefs counsel have discussed many questions which we do not consider necessary to decide in determining the rights involved in these appeals.

From the facts which we have stated, we think the decisive questions resolve themselves into three: First, was the use of an American port, under the circumstances shown, a breach of this Nation's neutrality under the principles of international law? Second, was such use of an American port justified by the existing treaties between the German Government and our own? Third, was there jurisdiction and right to condemn the *Appam* and her cargo in a court of admiralty of the United States? |

p. 148 It is familiar international law that the usual course after the capture of the *Appam* would have been to take her into a German port, where a prize court of that Nation might have adjudicated her status, and, if it so determined, condemned the vessel as a prize of war. Instead of that, the vessel was neither taken to a German port, nor to the nearest port accessible of a neutral power, but was ordered to, and did, proceed over a distance of more than three thousand miles, with a view to laying up the captured ship in an American port.

It was not the purpose to bring the vessel here within the privileges universally recognized in international law, i. e., for necessary fuel or provisions, or because of stress of weather or necessity of repairs, and to leave as soon as the cause of such entry was satisfied or removed. The purpose for which the *Appam* was brought to Hampton Roads, and the character of the ship, are emphasized in the order which we have quoted to take her to an American port and there lay her up and in a note from

His Excellency, The German Ambassador, to the Secretary of State, in which the right was claimed to keep the vessel in an American port until further notice, (Diplomatic Correspondence with Belligerent Governments Relating to Neutral Rights and Duties, Department of State, European War No. 3, p. 331,) and a further communication from the German Ambassador forwarding a memorandum of a telegram from the German Government concerning the *Appam* (*Idem*, p. 333), in which it was stated :

'*Appam* is not an auxiliary cruiser but a prize. Therefore she must be dealt with according to Article 19 of Prusso-American treaty of 1799. Article 21 of Hague Convention concerning neutrality at sea is not applicable, as this convention was not ratified by England and is therefore not binding in present war according to Article 28. The above-mentioned Article 19 authorizes a prize ship to remain in American ports as long as she | pleases. Neither the ship nor the prize crew can therefore p. 149
be interned nor can there be question of turning the prize over to English.'

In view of these facts, and this attitude of the Imperial Government of Germany, it is manifest that the *Appam* was not brought here in any other character than as a prize, captured at sea by a cruiser of the German navy, and that the right to keep her here, as shown in the attitude of the German Government and in the answer to the libel, was rested principally upon the Prussian-American Treaty of 1799.

The principles of international law recognized by this Government, leaving the treaty aside, will not permit the ports of the United States to be thus used by belligerents. If such use were permitted, it would constitute of the ports of a neutral country harbors of safety into which prizes, captured by one of the belligerents, might be safely brought and indefinitely kept.

From the beginning of its history this country has been careful to maintain a neutral position between warring governments, and not to allow the use of its ports in violation of the obligations of neutrality ; nor to permit such use beyond the necessities arising from the perils of the seas or the necessities of such vessels as to sea-worthiness, provisions and supplies. Such usage has the sanction of international law, Dana's Note to Wheaton on International Law, 1866, 8th American Edition, § 391, and accords with our own practice. Moore's Digest of International Law, vol. 7, 936, 937, 938.

A policy of neutrality between warring nations has been maintained from 1793 to this time. In that year President Washington firmly denied the use of our ports to the French Minister for the fitting out of privateers to destroy English commerce. This attitude led to the enactment of the Neutrality Act of 1794, afterwards embodied in the Act of 1818, enacting a code of neutrality, | which among other things inhibited p. 150

the fitting out and arming of vessels; the augmenting or increasing of the force of armed vessels; or the setting on foot in our territory of military expeditions; and empowering the President to order foreign vessels of war to depart from our ports and compelling them so to do when required by the law of nations. Moore on International Arbitrations, vol. 4, 3967 *et seq.*

This policy of the American Government was emphasized in its attitude at the Hague Conference of 1907. Article 21 of the Hague Treaty provides:

'A prize may only be brought into a neutral port on account of unseaworthiness, stress of weather, or want of fuel or provisions.

'It must leave as soon as the circumstances which justified its entry are at an end. If it does not, the neutral Power must order it to leave at once; should it fail to obey, the neutral Power must employ the means at its disposal to release it with its officers and crew and to intern the prize crew.'

Article 22 provides:

'A neutral Power must, similarly, release a prize brought into one of its ports under circumstances other than those referred to in Article 21.'

To these articles, adherence was given by Belgium, France, Austria-Hungary, Germany, the United States, and a number of other nations. They were not ratified by the British Government. This Government refused to adhere to Article 23, which provides:

'A neutral Power may allow prizes to enter its ports and roadsteads, whether under convoy or not, when they are brought there to be sequestrated pending the decision of a Prize Court. It may have the prize taken to another of its ports.

'If the prize is convoyed by a war-ship, the prize crew may go on board the convoying ship. |

p. 151 'If the prize is not under convoy, the prize crew are left at liberty.'

And in the proclamation of the convention the President recited the resolution of the Senate adhering to it, subject to the 'reservation and exclusion of its Article 23 and with the understanding that the last clause of Article 3 of the said Convention implies the duty of a neutral power to make the demand therein mentioned for the return of a ship captured within the neutral jurisdiction and no longer within that jurisdiction.' 36 Stat., Pt. II, p. 2438.

While this treaty may not be of binding obligation, owing to lack of ratification, it is very persuasive as showing the attitude of the American Government when the question is one of international law; from which it appears clearly that prizes could only be brought into our ports upon general principles recognized in international law, on account of unseaworthiness, stress of weather, or want of fuel or provisions, and we

refused to recognize the principle that prizes might enter our ports and roadsteads, whether under convoy or not, to be sequestrated pending the decision of a prize court. From the history of the conference it appears that the reason for the attitude of the American delegates in refusing to accept Article 23 was that thereby a neutral might be involved in participation in the war to the extent of giving asylum to a prize which the belligerent might not be able to conduct to a home port. See Scott on Peace Conferences, 1899–1907, vol. II, p. 237 *et seq.*

Much stress is laid upon the failure of this Government to proclaim that its ports were not open to the reception of captured prizes, and it is argued that having failed to interdict the entrance of prizes into our ports permission to thus enter must be assumed. But whatever privilege might arise from this circumstance it would not warrant the attempted use of one of our ports as a place in which to store prizes indefinitely, and certainly not where no | means of taking them out are shown except p. 152
by the augmentation of her crew, which would be a clear violation of established rules of neutrality.

As to the contention on behalf of the appellants that Article XIX of the Treaty of 1799 justifies bringing in and keeping the *Appam* in an American port, in the situation which we have outlined, it appears that in response to a note from His Excellency, The German Ambassador, making that contention, the American Secretary of State, considering the treaty, announced a different conclusion (Diplomatic Correspondence with Belligerent Governments, *supra*, p. 335 *et seq.*) ; and we think this view is justified by a consideration of the terms of the treaty. Article XIX of the Treaty of 1799, using the translation adopted by the American State Department, reads as follows.

' The vessels of war, public and private, of both parties, shall carry (*conduire*) freely, wheresoever they please, the vessels and effects taken (*pris*) from their enemies, without being obliged to pay any duties, charges, or fees to officers of admiralty, of the customs, or any others ; nor shall such prizes (*prises*) be arrested, searched, or put under legal process, when they come to and enter the ports of the other party, but may freely be carried (*conduites*) out again at any time by their captors (*le vaisseau preneur*) to the places expressed in their commissions, which the commanding officer of such vessel (*le dit vaisseau*) shall be obliged to show. But conformably to the treaties existing between the United States and Great Britain, no vessel (*vaisseau*) that shall have made a prize (*prise*) upon British subjects shall have a right to shelter in the ports of the United States, but if (*il est*) forced therein by tempests, or any other danger or accident of the sea, they (*il sera*) shall be obliged to depart as soon as possible.' (The provision concerning the treaties between the United States and Great Britain is no longer | in force, having p. 153

been omitted by the Treaty of 1828. See Compilation of Treaties in Force, 1904, pp. 641 and 646.)

We think an analysis of this article makes manifest that the permission granted is to vessels of war and their prizes, which are not to be arrested, searched, or put under legal process, when they come into the ports of the high contracting parties, to the end that they may be freely carried out by their captors to the places expressed in their commissions, which the commanding officer is obliged to show. When the *Appam* came into the American harbor she was not in charge of a vessel of war of the German Empire. She was a merchant vessel, captured on the high seas and sent into the American port with the intention of being kept there indefinitely, and without any means of leaving that port for another as contemplated in the treaty, and required to be shown in the commission of the vessel bringing in the prize. Certainly such use of a neutral port is very far from that contemplated by a treaty which made provision only for temporary asylum for certain purposes, and cannot be held to imply an intention to make of an American port a harbor of refuge for captured prizes of a belligerent government. We cannot avoid the conclusion that in thus making use of an American port there was a clear breach of the neutral rights of this Government, as recognized under principles of international law governing the obligations of neutrals, and that such use of one of our ports was in no wise sanctioned by the Treaty of 1799.

It remains to inquire whether there was jurisdiction and authority in an admiralty court of the United States, under these circumstances, to order restoration to an individual owner of the vessel and cargo.

The earliest authority upon this subject in the decisions of this court is found in the case of *Glass* v. *The Sloop Betsey*, 3 Dall. 6, decided in 1794, wherein it appeared that the commander of the French privateer,
p. 154 *The Citizen* | *Genet*, captured as a prize on the high seas the sloop *Betsey* and sent the vessel into Baltimore, where the owners of the sloop and cargo filed a libel in the District Court of Maryland, claiming restitution because the vessel belonged to subjects of the King of Sweden, a neutral power, and the cargo was owned jointly by Swedes and Americans. The District Court denied jurisdiction, the Circuit Court affirmed the decree, and an appeal was prosecuted to this court. The unanimous opinion was announced by Mr. Chief Justice Jay, holding that the District Courts of the United States possessed the powers of courts of admiralty, whether sitting as an instance or as a prize court, and sustained the jurisdiction of the District Court of Maryland, and held that that court was competent to inquire into and decide whether restitution should be made to the complainants conformably to the laws of nations and the treaties and laws of the United States.

The question came again before this court in the case of *The Santissima Trinidad*, decided in 1822, reported in 7 Wheat. 283. In that case it was held that an illegal capture would be invested with the character of a tort, and that the original owners were entitled to restitution when the property was brought within our jurisdiction. The opinion was delivered by Mr. Justice Story, and, after a full discussion of the matter, the court held that such an illegal capture, if brought into the jurisdiction of the courts of the United States, was subject to condemnation and restitution to the owners, and the learned justice said :

'If, indeed, the question were entirely new, it would deserve very grave consideration, whether a claim founded on a violation of our neutral jurisdiction, could be asserted by private persons, or in any other manner than a direct intervention of the government itself. In the case of a capture made within a neutral territorial jurisdiction, it is well settled, that as between the captors and the captured, | the question p. 155
can never be litigated. It can arise only upon a claim of the neutral sovereign, asserted in his own courts, or the courts of the power having cognizance of the capture itself for the purposes of prize. And by analogy to this course of proceeding, the interposition of our own government might seem fit to have been required, before cognizance of the wrong could be taken by our courts. But the practice from the beginning, in this class of causes, a period of nearly thirty years, has been uniformly the other way ; and it is now too late to disturb it. If any inconvenience should grow out of it, from reasons of state policy or executive discretion, it is competent for Congress to apply at its pleasure the proper remedy.' (p. 349.)

'. . . Whatever may be the exemption of the public ship herself, and of her armament and munitions of war, the prize property which she brings into our ports is liable to the jurisdiction of our courts, for the purpose of examination and inquiry, and if a proper case be made out, for restitution to those whose possession has been divested by a violation of our neutrality ; and if the goods are landed from the public ship, in our ports, by the express permission of our own government, that does not vary the case, since it involves no pledge, that if illegally captured, they shall be exempted from the ordinary operation of our laws.' (p. 354.)

In the subsequent cases in this court this doctrine has not been departed from. *L'Invincible*, 1 Wheat. 238, 258 ; *The Estrella*, 4 Wheat. 298, 308–311 ; *La Amistad de Rues*, 5 Wheat. 385, 390.

It is insisted that these cases involve illegal captures at sea, or violations of neutral obligation, not arising because of the use of a port by sending in a captured vessel and keeping her there in violation of our rights as a neutral. But we are at a loss to see any difference in principle

p. 156 between such cases and breaches of neutrality of the | character here involved in undertaking to make of an American port a depository of captured vessels with a view to keeping them there indefinitely. Nor can we consent to the insistence of counsel for appellant that the Prize Court of the German Empire has exclusive jurisdiction to determine the fate of the *Appam* as lawful prize. The vessel was in an American port and under our practice within the jurisdiction and possession of the District Court which had assumed to determine the alleged violation of neutral rights, with power to dispose of the vessel accordingly. The foreign tribunal under such circumstances could not oust the jurisdiction of the local court and thereby defeat its judgment. *The Santissima Trinidad, supra*, p. 355.

Were the rule otherwise than this court has frequently declared it to be, our ports might be filled in case of a general war such as is now in progress between the European countries, with captured prizes of one or the other of the belligerents, in utter violation of the principles of neutral obligation which have controlled this country from the beginning.

The violation of American neutrality is the basis of jurisdiction, and the admiralty courts may order restitution for a violation of such neutrality. In each case the jurisdiction and order rests upon the authority of the courts of the United States to make restitution to private owners for violations of neutrality where offending vessels are within our jurisdiction, thus vindicating our rights and obligations as a neutral people.

It follows that the decree in each case must be

Affirmed.

APPENDIX

COURT OF APPEALS IN CASES OF CAPTURE[1]

Miller et al., Libellants and Appellants, v. The Ship Resolution, and Ingersoll, Claimant and Appellee.

Miller et al., Libellants and Appellants, v. The Cargo of the Ship Resolution, and O'Brien, Claimant and Appellant.

(2 Dallas, 1) 1781.

THESE were Appeals from the Admiralty Court of *Pennsylvania*, where the Ship had been acquitted and the Cargo condemned.

After argument by *Wilcox*, *Lewis* and *Sergeant*, for the Appellants, and *Morris* and *Wilson* for the Appellees, the opinion and judgment of the Court (comprising a statement of all the facts and documents material to the case) were delivered by CYRUS GRIFFIN, the presiding Commissioner, in the following terms :

BY THE COURT :—We have considered these Appeals, and are now ready to give our judgment.

It has been very truly observed, that this Appeal is a case of importance, not only with regard to the subject in contest, but also with regard to the great Questions of Law, which the investigation and discussion of the merits necessarily introduced ; and being before this Court for their determination, the Judgment and Decree of this Court must be directed by the Resolves and Ordinances of Congress, and, where they are silent, by the Laws, Usage and Practice of Nations.

Upon these grounds, the case has been considered and argued by the counsel on both sides ; and considered so thoroughly and argued so copiously, fully and ably, that we have now every possible light of which the subject admits. |

The General Question is, ' Whether on all the circumstances of this p. 2
case, the Ship or Cargo, or both, or any part of the Cargo, be a prize ; and as such ought to be condemned and confiscated ? '—The Libellants contend that both Ship and Cargo are prize—if not the Ship, yet the Cargo is prize ; if not the whole of the Cargo, yet the principal part of it must be condemned.

Different grounds have been taken to support these several positions—

[1] This Court filed only the eight opinions reprinted below, all of which are reported in 2 Dallas, 1-42. The other cases decided by the court may be found in the appendix of volume 131 of the United States Supreme Court Reports, pp. xxxv-xlix.

One ground is taken to affect both Ship and Cargo ; other and different grounds to affect the Cargo ; other and different grounds to affect the principal part of it.

The argument directed against both Ship and Cargo is this : By the Law of Nations, after a capture and occupation for twenty-four hours, the Property captured is transferred to the Captors : But the Ship and Cargo in question were captured and occupied twenty-four hours—therefore the property was transferred to the Captors—and as the Captors were British subjects, the property was British property, and therefore legally attacked and captured by the American Privateer *Ariel.*

There is no doubt, but that a capture authorized by the Rights of War transfers the property to the Captor ; but the Question is, whether a Capture not authorized by the rights of war can have that legal operation : for, the Claimant says, ' that the Ship was not originally *British* but *Dutch* and Neutral property, and that the Cargo also was not originally *British* but Neutral Property, in consequence of Articles of Capitulation, stipulated on the conquest of *Dominica*, by the arms of his most *Christian Majesty.*'

All the authorities cited on cases of Capture authorized by the rights of war, are where the property captured was the property of an enemy : not an instance has been produced where a capture, not authorized by the rights of war, has been held to change the property ; but many authorities have been brought to shew, that no change is effected by such capture. To say that a capture which is out of the sanction and protection of the rights of war, can nevertheless derive a validity from the rights of war, is surely a contradiction in terms. The rights of war can only take place among enemies, and therefore a capture can give no right, unless the property captured be the property of an enemy. But it is stated, that both Ship and Cargo, in the present case, were originally (that is antecedently to the *British* capture) in the predicament of neutral property : No property then was transferred by the capture, and of consequence the property in question was not upon the ground it has been considered—*British* property. ' But, it is said, the fact cannot be ascertained, that the capture in this case was not authorized by the rights of war—for it depends upon the will of the sovereign, whether an outrage
p. 3 and capture, *supra altum mare*, by his subjects of the property of subjects of another nation, shall be an illegal and piratical act, or an act of hostility : That the sovereign is not obliged to promulge his will on the moment he makes war, and that as the human will has no physical existence, it cannot be ascertained but by a declaration of it by the sovereign himself, and therefore *non constat*, but that the capture in the present case was authorized by the *British* crown, and so a fair act of hostility, authorized by the rights of war.'

This argument is ingenious and plausible, but not solid. As the state of nature was a state of peace, and not a state of war, the natural state of nations is a state of peace and society, and hence it is a maxim of the law of nations, founded on every principle of reason, justice and morality, that one nation ought not to do an injury to another. As the natural state (that of nations) is a state of peace and benevolence, nations are morally bound to preserve it. Peace and friendship must always be presumed to subsist among nations; and therefore he who founds a claim upon the rights of war, must prove that the peace was broken by some national hostility, and war commenced: but mere conjecture, supposition and possibility, can render no competent evidence of the fact. But it is said 'here was a national hostility—viz. The capture by the *British* privateer; and the act of the subject is the act of the sovereign.'

The act of the subject can never be the act of the sovereign; unless the subject has been commissioned by the sovereign to do it: But, in this case, there is no evidence that the commission of the *British* privateer extended to property, under the circumstances of the property captured.

But it is asked 'what private or public mischief can be apprehended from considering property under the circumstances of this case as prize: For, the wrong was committed by the *British* privateer, and therefore the *British* nation is chargeable with it, and bound to make compensation.'

We are inclined to think, that were the claimants to apply to the *British* crown for compensation, they would be told 'that altho' satisfaction were done, yet it would be in proportion only to the wrong done by the *British* privateer, which consisted only in the seizure and detention. But if compensation was expected for ship and cargo, they must look to that nation for it, whose courts declared a condemnation, and whose subjects reaped the fruits of it.'

But, 'tis alledged, that 'the late ordinance of Congress is express and decided, that after a capture and occupation for twenty-four hours the property captured shall be prize.'

The ordinance of Congress certainly speaks of a legal capture; to admit a different construction would be a violence both to the | terms p. 4
and spirit, or intention, of it. Prize is generally used as a technical term to express a legal capture; and Congress having adopted it in framing of the ordinance, the general sense or acceptation of it must determine its import and signification. But suppose the term *prize* merely imported a capture, without any reference to its legality, and that it was the spirit and intention of the ordinance to subject to *prize* all captures, both legal and illegal, after twenty-four hours; it does not follow that it would affect the present case. The municipal laws of a country cannot change the law of nations, so as to bind the subjects of another nation; and by

the law of nations a neutral subject, whose property has been illegally captured, may pursue and recover that property in whatever country it is found, unless a competent jurisdiction has adjudged it prize. The municipal laws of a country can only bind its own subjects.

The ordinance of Congress is in truth a new regulation of the *jus post liminii*, and limits it to a recapture within twenty-four hours, and therefore can only relate to the subjects of the *United States*: it adopts the ordinance of *France*, and that ordinance relates only to the subjects of *France*. In both cases, with regard to the owner, *a subject*, the property captured is not passed away before the expiration of twenty-four hours. But put the case of a capture and the sale of it before twenty-four hours to a neutral subject; the sale is certainly good and conclusive upon the owner; for the question must be decided by the law of nations, and by the law of nations, the property captured is transferred to the captor as soon as it is taken.

Both the ordinances therefore of *Congress* and of *France*, in our opinion, relate only to property captured from a subject and recaptured; and not to property captured from a neutral and recaptured. It is said, 'that arguments drawn from the law of nations with regard to *Pirates*, do not apply to the present case, because pirates have not the rights of war.'

If the principal fact was properly attended to, the present case could not be questioned. Whence is it that pirates have not the rights of war? Is it not because they act without authority and commission from their sovereign? And is it not objected and proved, that the *British* privateer, with regard to the property captured, acted without commission and authority from the *British* crown? So far from there being any dissimilarity in the cases, it is in fact the very case in judgment, considering it on the first ground of argument.

But, it is alledged, 'that the capture by the *British* privateer must be considered as legal: For, after a capture and occupation for twenty-four hours, the legality of the capture is not open for question and examination.'

p. 5 This doctrine must never be suffered; there is no example or precedent for it to be found in any of our books; it breaks down and destroys the distinction between right and wrong; it gives a sanction to injustice, robbery and piracy, and it is reprobated by the laws, usage and practice of nations. Lord *Mansfield*, in the case so often quoted, 2 *Burr.* 693, says, 'The question, whether the property is transferred by the capture, can only happen between the owner and vendee, and between the owner and the recaptor.' But the question could never happen between the owner and the recaptor, if the legality of the capture was not examinable on every libel for condemnation as prize. The question is—Prize or no Prize? That is whether the capture be legal or not.

The legality of a capture is open for question and examination, till a competent jurisdiction has decided the question, and a decree passes for condemnation as prize; then, and not before, all further questions and examinations are precluded; then, all parties, and all foreign courts, are estopped to say, 'the capture is not legal;' and if the decree be erroneous or iniquitous, the party injured must apply for redress to that nation, whose courts have committed the error or iniquity.

'Great difficulties, it is said, will arise, if capture and occupation for 24 hours should not be considered as conclusive evidence of property in the captor, and that the capture was legal.' And it is asked 'must a regular title be deduced from the first proprietor to the captor, as in case of an ejectment at the common law?' And 'must common law strictness, in making out titles, be adopted in Admiralty courts?'

Every libel states a title to the thing captured; the title must not only be stated, but it must also be proved. It is stated in the libel in this case, that the property captured was *British* property, and the evidence to prove it is, 'possession and occupation of it by the *British* privateer.'

A title thus traced is a good one, in a court of common law, except in a single case: it is a good title against all the world *except the right owner*. This exception is founded on every principle of reason and justice; it ought not only to be adopted in courts of common law, but in every court, where the distinction between right and wrong is preserved, and justice regarded. Possession and occupation ought, upon a question of property, to have the same influence in courts of admiralty, as in courts of common law: it ought to be considered as a good title, and conclusive upon all mankind except the *right owner*. Such a title is clear of all difficulties in the proof of it; it excludes the necessity of a regular deduction of title from the first proprietor down to the captor; it is disengaged from those entanglements, which result from a variety of possible changes and mutations of the | property; and it cannot be shook, but when every p. 6
honest man will say it ought to be shook;—when the right owner appears and proves his property. We have now done with the observations and reasoning, that relate to the first ground of argument: and are of opinion, that if the ship and cargo were originally neutral property, the capture and occupation for 24 hours did not change it into *British* property and make it prize.

But another ground has been taken to affect the cargo: The libellants say, 'that the cargo is the produce and growth of *Dominica*; that the said cargo is the property of *British* subjects of that Island; that therefore it was not neutral property, but *British*, and originally prize.'

To this the claimants reply, 'that after the declaration of independence and after the alliance of these States with *France*, the *British* Island

of *Dominica* was taken by the arms of his most *Christian Majesty*; that before the reduction of it, articles of capitulation took place, by which the owners and possessors of estates in the Island were secured in the possession and enjoyment of them, and indulged with carrying on trade and commerce, upon an equal footing with subjects of *France*; that the said Island since the conquest has been under the protection and government of *France*; that before the sailing of the ship a passport was obtained from the *French* Governor, requiring all commanders of *French* armed vessels, and all commanders of *Spanish* and *American* armed vessels, the allies of *France*, not to impede or obstruct the passage of said ship, the cargo on board being property of capitulants; that the said articles of capitulation bind *America* as the ally of *France*; that therefore the cargo, although the property of *British* subjects yet it is *British* property protected from capture, by the articles of capitulation; and that it is in the predicament of neutral property, and therefore was not originally prize.'

Upon these facts and allegations two capital questions arise:

1st. Whether the cargo was *British* property, protected by the articles of capitulation against *French* and *British* captures?

2d. Whether *America*, as the ally of *France*, is bound by the articles of capitulation?

With regard to the first question it is contended, on a variety of grounds, that this cargo is not protected from capture by the articles of capitulation.

1st. Because the capitulation does not extend to property shipped and on passage at sea.

2d. Because the owners were principally non-residents at the time of capitulation, and, therefore, although owning estates at *Dominica*, cannot be considered as capitulants. |

p. 7 3d. Because the proceeds of this cargo were to be remitted from *Holland* to the owners residents in *Great Britain*.

4th. Because the voyage was in fact calculated for *Great Britain* and for *Amsterdam* in *Holland*, and therein was a breach of the articles of capitulation, and a forfeiture of its protection.

5th. Because the cargo on board was the property of *British* subjects not residents, nor owning estates, in *Dominica*, and therefore not within the protection of the capitulation.

The first, fourth, and fifth grounds, apply to the whole cargo, and the second and third to the principal part of it.

Whether the articles of capitulation extend protection to property after shipped and on its passage at sea, depends on the 13th article, and the general tendency and scope of the capitulation itself.

The main design of the capitulants was, to obtain a perfect security

for their estates and property; and a full exercise of all the rights of property and ownership: And one great object with the *French* General was, to secure to *France* the commerce of the Island, and all its advantages, emoluments and revenues; but it was inconsistent with the design and object, which both had in view, to open to *French* and British capture the produce of the Island, and property of the capitulants, as soon as a-float at sea.

This would have injured the rights of property, discouraged the labour and agriculture of the Island, lessened its exports, and diminished the revenues of its government.

But the thirteenth article seems decisive: it stipulates 'that the *Merchants* and *Inhabitants* of this Island, included in the present capitulation, shall enjoy all the privileges of trade, and on the same conditions as are granted to the subjects of his most *Christian Majesty*, throughout the extent of his dominions.'

By this article the capitulants are placed, with regard to their trade and commerce, on an equal footing with the subjects of *France*; every commercial privilege which the subjects of *France* enjoy is conceded to the capitulants; but it is certainly one privilege which a subject of *France* enjoys, that his property at sea, in the line of a fair trade and commerce, shall not be captured as prize by *French* subjects; consequently the cargo in this case, which is the property of capitulants, cannot be subject as prize to *French* captures. But is it asked, 'was it not subject to *British* capture'? The article, it is said, stipulates, that the trade shall be carried on upon *the like condition* with the *French* trade, and the *French* trade is subject to interruption by *British* capture.

Had the capitulation stipulated generally, that the capitulants should exercise all the rights and privileges of trade exercised by | the subjects p. 8
of *France*, the case would have been a clear one; the capitulation then might have been fairly considered as a compact between the *French* and *British* crowns, that a trade should have been carried on by the capitulants, in the extent of the *French* trades, and consequently that neither crown could interrupt it by captures without a breach of faith: The difficulty arises upon the provision in the article, that the privileges of trade shall be considered *upon the conditions* of the *French* trade, which it is said implies, 'that as the *French* trade is exposed to *British* captures, so must be the trade of the capitulants.'

It is observable, that this article is propounded on the part of the capitulants, and the *conditions* stipulated must have been in their ideas productive of some benefit and advantage: Was it for the benefit and advantage of the capitulants, that their property so captured should become the property of the captors, and liable to confiscation? Certainly not.

But admit, that this article was propounded on the part of the *French* general; what beneficial object could he have in stipulating, that this trade should be exposed to *British* capture? Was it for the interest and advantage of the *French* crown, that this fresh accession to its commerce should be harassed and discouraged by *British* capture? Certainly not.

A construction then so pointedly against the interest of both parties can never be the right one: The truth is, the condition expressed in the article refers only to the duties, imposts and regulations of commerce.

But if the construction was admissible, that it was for the interest of the *British* capitulants, that this trade should be liable to such interruption by *British* captures, what must we think of the opinion of the eminent Lawyers of *Great Britain* which have been cited? They say, that this trade is protected by the capitulation against *British* captures: Deciding then against the contended interest of the capitulants, do not their opinions from such a circumstance acquire a great additional force? The *British* Crown by its proclamation gives incontestible evidence, that the property of the capitulants is not exposed to *British* capture; for it refers to the capitulation, asserts the protection it gives, and confirms it.

With regard then to the *question*, 'whether the capitulation extends protection to property, when shipped from the Island and afloat at sea?' *We are of opinion that it does.*

But it is objected, on the second ground of argument, that the cargo was principally the property of residents in *Great Britain* at the time of the capitulation, and, therefore, although owning estates in the Island, yet not entitled to the benefit of the capitulation.]

p. 9 It will be proper in the consideration of this objection to attend to the 9th, 12th and 13th articles of capitulation.

The 9th article says: 'The absent inhabitants, and such as are in the service of *Great Britain*, shall be maintained in the possession and enjoyment of their estates; which shall be managed for them by their attornies.'

The 12th article says: 'That widows and other inhabitants, who, through illness, absence, or any other impediment, cannot immediately sign the capitulation, shall have a limited time to accede to it.'

And the 13th article says: 'The inhabitants and merchants of this Island included within the present capitulation, shall enjoy all the privileges,' &c.

The fact is admitted, that the cargo is the produce and growth of *Dominica*, and that the principal part of it belongs to *British* subjects; possessing estates in the Island, but non-residents at the time of the capitulation.

It is objected, 'that with regard to such non-residents, the operation of the 9th article extends no farther than to protect the estates of such

persons from seizure and confiscation, by the rights of conquest ; that the 12th article extends only to those who have acceded to the capitulation within the time limited, and that the 13th article extends only to such inhabitants and merchants as are included at the time of capitulation, and not to non-residents.

To this it is replied, ' that by the 12th article absentees may come in within a limited time and accede to the capitulation, and that then they fall within the description of the 13th article, which says, ' the inhabitants and merchants of this island, included within the capitulation, &c.'

Upon these allegations and facts, two questions arise :

1st. Whether the claimants who were non-residents and absentees at the time of capitulation have acceded to it ?

2d. Whether having acceded to it, they come within the description of the 13th article, and are entitled to the rights and privileges of trade there conceded ?

We have carefully examined all the bills of lading and the depositions annexed, and find that the property mentioned in each bill is proved, by the respective depositions, to be the property of a *British* capitulant. Whether he personally, or by attorney representatively, subscribed the capitulation, does not appear ; nor do we think it material, for the maxim is a true one, *qui facit per alium, facit per se.*

It is proved by the deposition of Mr. Fitzgerald, that in the general sense and opinion of the people of the Island, the subscription of an attorney for his principal was sufficient, and Mr. *Fitzgerald* mentions an instance, where a principal was refused by | the *French* Governor the p. 10
benefit of the capitulation, because his attorney had neglected to subscribe for him. He also proves, that it was the uniform and uninterrupted practice of the Island, for principals non-residents to subscribe by attorney ; which would not have been the case, unless such mode had been agreeable to the spirit and intention of the capitulation.

But it is said, ' that none could accede to this capitulation but such as were in a capacity to stipulate a neutrality, and that non-residents, in *Great Britain*, although owning estates in *Dominica*, could not consistently with their allegiance engage a neutrality of conduct.'

It must be admitted, that where the supreme authority is competent to protect the rights of subjects, a subject cannot divest himself of the obligation of a citizen, and wantonly make a compact with the enemy of his country, stipulating a neutrality of conduct ; but certainly he may enter into such an agreement, when it is no longer able to give him protection. In the present case, the *British* Crown was not able to secure to the owners their estates in *Dominica*, and therefore they had a natural right to make the best terms they could, for the preservation of their property ; for, it is a general maxim of the law of nations ' that although

a private compact with an enemy may be prejudicial to a state in some degree, yet if it tends to avoid a greater evil, it shall bind the state, and ought to be considered as a public good.' The owners therefore of the cargo in question, though non-residents at the time of the capitulation and out of the reach of personal injury, yet having estates in the Island, in danger of confiscation by conquest, had a right to avail themselves of the terms proffered by the capitulation, and engage a neutrality of conduct, by acceding to it.

But it is said ' that very possibly some of these non-residents are at this day in the military service of *Great Britain.*'

Our opinion is, that the 9th article, with regard to all absentees, and such as are in the service of *Great Britain*, only exempted their estates from forfeiture by the rights of conquest. The rights and privileges of trade are considered only by the 13th article. No one can bring himself within the 13th article, that has not signed the capitulation, and every one who signs the capitulation engages a neutrality of conduct. If any one subscribing the capitulation should afterwards go into the service of *Great Britain* and commit acts of hostility against *France* and *America*, he would break his engagement of neutrality, and forfeit all the rights and privileges of trade, and his property captured at sea would become prize.

It is a rational construction to consider neutrality as the great basis of the capitulation. The estates indeed of absentees, and such as were
p. 11 engaged in the service of *Great Britain*, appear to | have been secured at all events from forfeiture, without a stipulation for neutrality ; but with regard to the rights and privileges of trade, they can be only exercised by those who have acceded to the capitulation and engaged a neutrality. Admitting then that the owners of estates in the Island of *Dominica*, and non-residents and claimants in the cause, have properly acceded to the capitulation ; the mere question is, whether they come within the 13th article, and are entitled to the rights and privileges of trade there conceded ? As we conceive that this article was conceded as a liberal compensation for the stipulation of neutrality, we have no doubt but that these non-residents, who owned estates in *Dominica* and have acceded to the capitulation and neutrality, come within the description of the 13th article, and are entitled to all the rights and privileges of trade, which it provides for and stipulates.

The third ground of argument, on which it is contended, that this cargo is not protected by the capitulation against capture, is this : That the proceeds of the cargo were to be principally remitted to *Great Britain*, on the order of the owners resident there, and therefore that this cargo was in a line of trade not within the protection of the capitulation. We have already given it as our opinion, that the 13th article gives the capitu-

lants a protected trade to every port, where the trade and commerce of *France* extends. And we have given it as our opinion, that with regard to the rights and privileges of trade, there is no difference between the inhabitants, and those absentees, non-residents, who have acceded to the capitulation and neutrality. The only circumstance then to take this cargo out of the protection of the capitulation must be the letters of advice of the agents at *Dominica*, advising the consignees at *Amsterdam*, to whom the cargo belonged, and that the proceeds of the principal part of it were to be at the disposal and order of the owners, residents in *Great Britain*. We cannot see the force of this circumstance in the extent contended for, if the agents rightfully exported the produce of the estates of those non-residents, in conformity to the capitulation. The letters of advice cannot give this commercial act a different complexion ; the agents could not ship this property in their own right, without taking upon themselves a risk of the voyage ; and the Bills of Lading necessarily allowed that the proceeds were at the disposal of the owners. Could agents have acted with more propriety ? Every step they took was the natural result of the rights of trade conceded by the capitulation. But it is objected, ' that the 20th article shews, that no remittance was to be made, but for education and support of children.'

The article is this : ' The inhabitants of the Island shall have liberty to send their children to *England*, to be there educated, | and to send p. 12
them back again, and to make remittances to them while in *England*.'

This article by no means proves, that no remittances were to be made of proceeds on sales in a neutral country; tho' the children might have had remittances in that train of intercourse, yet the mode might have been thought too circuitous and dilatory. A remittance in a direct line was more eligible. Besides, remittances on sales abroad could only be in money or bills ; but by this article there is no limitation of the species of remittance, and it may be in produce.

The capitulation must receive a liberal construction. It was the fabrick of a great, enlightened, General, and every part of the structure exhibits a liberality and grandeur of spirit, that does honor to human nature. It is said, that if the property of the capitulants is thus protected from capture, it is in a better situation than *French*, *American* or *British* property ; it is precisely in the situation of neutral property. It was far from being the wish of the capitulants to have had their property placed in such a predicament upon the terms it was done. They were reduced and obliged to submit to it by force of arms. But the situation of those people is mentioned as a happy one : If to be a conquered people, and inforced to all the contingent consequences of a conquest, be a pleasing condition, these people may then boast of their being in a happy one.

It is said the *British* crown must be benefited by this condition of their subjects.

The *British* crown may indeed be benefited in some degree ; it was not meant to deprive *Great Britain* of every benefit ; she draws some benefit from having a few remittances made from sales abroad, to a few of her subjects in *England*, owning estates in *Dominica*. But then to gain the advantage she yields up the personal service of those subjects, for they are bound to observe a neutrality. But has *Great Britain* lost nothing by the conquest ? Who possesses the Island of *Dominica* ? Who possesses all the advantages and benefits of its trade ? Who has obtained its commercial revenues ?

It is true she is not at the expence of the government of that island. But it is true she has lost, Island, government and revenues. When the consignees disposed of the cargo, they became debtors for the monies received. The making of remittances in satisfaction of debts, although to subjects of a nation at war, is no violation of the duties of a citizen. Nor will the usage and practice of civilized nations forbid it. Tobacco shipped to *France*, with an avowed intent to remit the proceeds to *England* for the payment of debts, would not be prize on an *American* capture.

p. 13 We come now to the fourth ground of argument, on which it | is contended, that this cargo is not within the protection of the articles of capitulation ; that is, that the voyage was calculated for *Great Britain*, and not for *Amsterdam* in *Holland*, and therefore in breach and out of the protection of the capitulation. This argument is grounded upon several circumstances and upon evidence, that point at some latent object, but do not speak decisively upon it : They prove a secrecy and concealment, with regard to the voyage to *Dominica*, and the taking a cargo there ; but all these circumstances are easily explained, without adopting the idea that the voyage was intended for *Great Britain*. What is suggested in *Capt. Waterburgh's* letter, was a mere precautionary measure to avoid *British* cruizers, that perpetually harassed the *Dutch* trade, by capturing their vessels. In the same letter he mentions the capture of a *Holland* ship which had been carried into *St. Kitts* and released ; the letter is dated *Eustatia* ; and the manœuvres he mentioned were to secure the voyage to *Dominica*.

The voyage from *Dominica* to *Amsterdam*, we have no doubt, was planned in *London*, between the capitulants there, owning estates in *Dominica*, and *Daniel Heshuysen*, agent for *Brantlight & Son*. The letter addressed to *Moreson*, at *Dominica*, was dated at *Amsterdam*, tho' wrote in *London*, because *Brantlight & Son* lived at *Amsterdam*, and because the cargo was to be consigned to them at *Amsterdam*, and it was dated the day of the date of his own letter, which inclosed it, because it was then wrote. As for the secrecy enjoined in *Brantlight*

& Son's letter to *Captain Waterburgh* while at *Eustatia*, with regard to the voyage to *Dominica* and the taking a cargo there, we cannot think they had any other motive for it than such as often influences merchants in the conduct of a fair trade, to keep to themselves their commercial plans. But what force can these circumstances have when opposed by the positive evidence that is produced ? The Bill of Lading and a variety of letters from the shippers and attornies for the owners in *London*, some addressed to *Brantlight & Son*, and others to the owners, prove that the voyage was for *Amsterdam* ; all the ship papers also prove it. But the depositions of *Waterburgh* and *Moreson*, to whom the ship was consigned, and by whom the ship was loaded, are conclusive : They, upon clearing out of the ship, swear expressly that she was destined for *Amsterdam*.

We are now come to the last ground, which has been taken to prove the cargo not to be protected by the articles of capitulation, which is : That the property of the cargo on board, was the property of *British* subjects, not residents or owning estates in *Dominica*. But what is the evidence produced to prove this ? It is a letter from *Moreson* to *Brantlight & Son*, in which he mentions the alarm occasioned by the rupture between *Great Britain* and the *States General*, and the fears and | apprehensions p. 14 the merchants and shippers were under, relative to putting property on board a *Holland* vessel ; he afterwards mentions the arrival of the king's proclamation, protecting *Holland* vessels from capture, and says ' even then no one but *Mr. Kender Mason* and myself would put a hogshead on board your ship, as the king's proclamation laid so much blame on your city ; but we have agreed, &c.' and then says they have agreed to ship, and assigns the reasons.

The fact does not appear, that *Kender Mason* had any property at all in *Dominica*, nor that he had any attorney or agent ; it appears he lived in *London*, and was a correspondent of *Moreson's* House in *Dominica*. It appears *Daniel Hesuysen*, as agent for *Brantlight & Son*, obtained a letter from this *Kender Mason* addressed to *Moreson*, which he enclosed to *Captain Waterburgh* at *St. Eustatia*, and in consequence of which *Captain Waterburgh* was ordered to *Dominica*. This letter was probably delivered by *Waterburgh*, as it is not to be found among the ship's papers. We have no evidence of the contents of this letter, but it appears to us, to have been a letter recommending *Brantlight & Son* to *Moreson's* House. The plan of the voyage being settled in *London*, it was natural to obtain letters of introduction from thence.

But *Moreson's* letter, it is objected, speaks expressly of *Kender Mason* having shipped property on board, and there is no proof, that he is a *British* capitulant, and therefore, here was property on board belonging to a *British* subject, who was neither a resident in *Dominica*, nor an

owner of estate there, and, consequently, it was *British* property not protected by the capitulation.

Moreson's letter, if good evidence, to prove the fact with regard to *Kender Mason*, must be taken as good evidence to prove every fact stated in it; for it must be taken altogether and admitted, or rejected *in toto*.

He says then, 'No one but *Kender Mason* and myself, would put a hogshead on board, &c.' *Moreson* then, as well as *Kender Mason*, had property on board. *Moreson* also mentions in his letter, that afterwards there was an agreement to ship generally, and assigns the reasons. The shippers must be other persons besides *Mason* and *Moreson*: So that even upon the evidence of *Moreson's* letter, *Kender Mason* could have but *a part* of the cargo, the *quantum* of which is not at all ascertained.

But we are inclined to think, that this letter of *Moreson's*, with regard to *Kender Mason* shipping property on board, is a mistake. *Kender Mason* was certainly not at *Dominica*, and yet the letter conveys that idea: 'A general panic had seized the merchants, they would not ship until the arrival of the King's Proclamation, and even then *Kender Mason* and myself were the only persons who would ship a hogshead.' The
p. 15 person *Moreson* | meant to speak of must have been on the spot. He was one whom the panic had not taken hold of; he was one who with *Moreson* took the resolution to ship, notwithstanding the alarming rupture between *Great Britain* and the *States General*; he was one who was led to ship from a confidence in the King's Proclamation. We have it in evidence that *Captain Waterburgh* had letters of recommendation both to *Moreson* and a *Mr. Alexander Henderson*. These letters were inclosed to the captain in a letter from *Brantlight & Sons*. It appears, that on the captain's application to *Moreson*, nothing could be done without *Henderson; Moreson* and *Henderson* were the persons who were consulted, and the first who moved to provide a loading for the ship. It appears from the Bills of Lading, that *Henderson* was a principal shipper. These circumstances considered, the supposition which was made by the counsel for the claimants, is not altogether without foundation, that *Kender Mason*, was by mistake inserted for *Henderson*.

But be the fact as it may, we must determine according to the weight of evidence. The Bills of Lading shew, that *Kender Mason* had no property on board; for every bill mentions the person to whom the *property* belongs, and each bill has a deposition annexed to it, proving the property mentioned to be the property of the persons mentioned, and it appears that there was no other property than what was mentioned in the Bills of Lading, and no where in those Bills is the name of *Kender Mason* to be found. To say then that *Kender Mason* had property on board, is to say that upwards of twenty persons have committed perjury, for there is that number of Bills of Lading and depositions: A mere

assertion in a letter can never be suffered to weigh down such a powerful combination of positive proof on oath.

Having now considered all the grounds, on which it was objected that the cargo was, in this case, not protected by the articles of capitulation—we are of opinion that this cargo was protected by the articles against all *French* and *British* captures ; and if *America* is bound by the articles, protected also from *American* captures. But the question is, whether the articles of capitulation bind *America* ? *Vattel*, a celebrated writer on the laws of nations, says, ' when two nations make war a common cause, they act as one body, and the war is called a society of war ; they are so clearly and intimately connected, that the *Jus Postliminii* takes place among them, as among fellow subjects.' It appears from the established form of Ransom Bills, that a compact of that nature binds the ally, and it appears by the Passport granted by the *French* Governor of *Dominica*, that he considers the capitulation as obligatory upon *America* ; for he requires all commanders of *French* vessels, and all commanders | of *Spanish* vessels, and *American* vessels, the allies of p. 16
France, not to impede the navigation of said ship, in her passage to *Amsterdam* ; for that the shippers of the cargo were capitulants, under the protection of the *French* crown. From the very nature of the connection between allies, their compacts and agreements with the common enemy must bind each other, when they tend to accomplish the objects of the allies. Both nations have one common interest and one common object. If such agreements, when correspondent to the terms upon which the alliance is formed and calculated for the attainment of the views and designs which gave birth to it, do not bind the ally, then the consequence would be, that the ally would reap all the fruit and advantages of the compact, without being subject to the terms and conditions of it ; while the enemy with whom the compact is made, is exposed, with regard to the ally, to all the disadvantages of it, without participating of all the benefits stipulated ; an inequality of obligation reprobated by every principle of reason and justice.

If *America* is not bound by the capitulation, then it can give no security to the capitulants, nor can they with safety exercise the rights and privileges of trade conceded to them. *America* being in alliance with *France*, the ports of *France* are opened to our armed vessels ; and an *American* privateer might post herself in the ports of *Dominica*, watch the sailing of the ships from that port, pursue and capture them. Under such circumstances the trade and commerce of the Island would be totally annihilated. But not only the capitulants would suffer ; *France* would equally suffer ; for, if exportation ceases, the commercial revenue of the Island must cease with it.

The conquest of *Dominica* was productive of great advantages to the

common cause. It was a considerable reduction of the power and resources of *Great Britain*; it placed a great body of her subjects in a state of neutrality; it lessened the commerce and revenues of her government, and eventually deprives her of a part of her dominions.

But if *America* is not bound by the capitulation, neither can the capitulants be bound with regard to *America*; for no engagement can be a valid one, which ties up the hands of one party, and leaves the other party at full liberty to exercise, on the party bound, all the rights of war.

Then, what should we think of the *French* Governor of *Dominica*, were he to suffer the capitulants to fit out armed vessels, to cruize against *America*. But it is said, that the capitulation, so far as it is contended to bind *America*, is unequal; for *American* property exported from *Dominica* would be liable to *British* capture, which *British* property would not. |

p. 17 This argument is not a fair one; it blends together what ought to be distinguished; a difference ought to be observed between the property of *British subjects* and *British capitulants*.—*British* subjects, not capitulants, may rightfully capture *American* property: *Americans* may rightfully capture their property; but *British* capitulants cannot capture *American* property; and therefore it is a perfect equality, that *Americans* shall not capture the property of capitulants.

But it is thought strange, that while *French*, *Spanish*, *American* and *British* property should be liable to capture, the property of the capitulants should be exempted from it.

Let us advert for a moment to the peculiar situation of those capitulants. They are a conquered people and reduced to the government of *France*; they are by compact a neutral body; they have neither the power of war, nor peace; they commit hostilities against no nation; neither against *France*, nor *Spain*, nor *America*, nor *Britain*; where then is the strangeness in the doctrine, that the property of a people thus reduced, thus defenceless, and thus acting in the line of neutrality, should be protected from capture?

But the resolutions of Congress, with regard to *Bermudas* and other Islands, have been objected, and it is said that *Count d'Estaing* captured the vessels belonging to those Islands, though, by the resolve of Congress, they were exempted from capture; which, it is contended, shews that the agreement of one ally does not bind the other. The resolutions of Congress cannot be considered as a compact with the people of *Bermudas* and the other Islands; for those people were not in a capacity to make a compact; they were under subjection to the *British* Crown, and had no authority from the Crown to enter into engagements with *America*. The resolutions therefore of Congress were a mere voluntary suspension

of the rights of war, with regard to those people, the continuance of which was perfectly optional with *America.*

If *France* was bound by these resolutions of *Congress*, she would only be bound in the extent that *America* was. *America* might say when she pleased, that those resolutions should not exist, and so might *France.*

But if *France* was bound to a neutrality with regard to *Bermudas* and those other Islands ; then *Bermudas* and those other Islands were bound to a neutrality with regard to *France* : But those Islands were not bound, therefore *France* was not bound ; and *Count d'Estaing* was well justified in the captures he made.

With regard then to the question, ' whether the articles of capitulation bind *America,*' we are of opinion that they do. |

But the claimants take a ground which they say will save the cargo p. 18
at all events ; and this ground is the ordinance of *Congress*, which relates to the rights of neutrality.

Congress, October 1786, taking into consideration the declaration of her *Imperial Majesty* of *Russia*, with regard to the rights of neutrality, adopt the principles of the declaration, and appoint a committee to report resolutions conformable to them. Resolutions are reported, and on the 7th of April 1781, before the capture in the present case, Congress pass an ordinance ascertaining a set of instructions for commanders of armed vessels, the 3d. and 4th of which are as follow :

3d. ' You shall permit all neutral vessels freely to navigate on the high seas or coast of *America*, except such as are employed in carrying contraband goods, or soldiers, to the enemies of these *United States.*'

4th. ' You shall not seize or capture effects belonging to the subjects of the belligerent powers on board of neutral vessels, excepting contraband goods, &c.'

Great Britain, before the capture, had commenced hostilities against the States General ; but by proclamation exempted from capture, for a limited time, all ships and vessels, belonging to the States General of the United Provinces, carrying the produce of manufactures of *Dominica*, according to the articles of capitulation. The ship in this case was the property of *Brantlight and Son*, subjects of the States General, carrying the produce of *Dominica* according to the capitulation. She was captured by a *British* privateer, within the limited time ; and on a supposition that *America* is not bound by the articles of capitulation, her cargo was the property of *British* subjects at war with *America.* This case comes expressly within the fourth instruction ; the ship is certainly within the predicament of neutral property, and the cargo is the property of subjects of a belligerent power.

But, it is said, that the rights of neutrality were broken by the *British* capture.

The *British* capture was illegal; it was without authority from the *British* Crown. It was directly against the articles of capitulation, and in opposition to the *British* proclamation; it was a piratical act, in legal strictness, and only excusable on the circumstances of the case. But shall *America* violate rights of neutrality, because another nation has done it? Or, which is the present case, because a subject, without authority from his nation, has done it? Did the ship cease to be a neutral ship by the capture, and did the cargo cease to be *British* property? If not; then, at the time of the recapture, the ship was a neutral ship, and the cargo, effects belonging to the subjects of a belligerent power, and so expressly within the 4th instruction. But it is objected, 'that *Great Britain* has
p. 19 not acceded to the rights of | neutrality, and therefore the property on board a neutral vessel ought not to be protected.'

The ordinance of Congress makes no exception of *Great Britain*; for it says, you shall not seize or capture effects belonging to the belligerent powers on board of neutral vessels. *Great Britain* is here beyond a doubt comprehended; for she was a belligerent power when the ordinance passed.

But it is said this ordinance of Congress is obligatory only on commanders of vessels, but not in the Courts of Admiralty and Appeal. We cannot think that this objection was seriously made.

Upon the whole, we are of opinion that the decree below with regard to the ship, be confirmed; and with regard to the cargo, that it be reversed, and the cargo be charged with the stipulated freight.

Miller, Libellant and Appellant, v. The Ship Resolution, &c. The Same v. The Cargo of The Ship Resolution, &c.

(2 Dallas, 19) 1781.

On motion of *Wilson*, for the Appellants, a rule had been granted in *September* Session last, to shew cause, why there should not be a rehearing in these Appeals: 1st, because the decree had erred in fact; and 2d. because there had been a discovery of material testimony since it was pronounced: And, it was argued on the 26th *December*, 1781, by *Morris*, in support of the rule, and by *Serjeant* and *Wilcocks*, in opposition to it.

In support of the rule, it was said, that the rehearing ought to be allowed, on the principle that *humanum est errare*; and by analogy to the practice of the Court of Chancery, founded on that principle. It is true, that the interest of the community requires, that there should be an end to controversies; but this must be attended to, consistently with doing justice. A rehearing of the Chancellor's decree seems, indeed, to be a matter of course, on application, for that purpose, by any two

Counsel of respectable character. *Bo. Cur. Can.* 240. 243. 364. 385. 405.—The petition for a rehearing was filed, as soon as information of the decree was received: There has, therefore, been no laches | in making p. 20 the application; and even when the Chancellor has made his final decree, the form of petition merely states that he has erred in conscience, as to the facts; and the application is seldom refused. But though the request of Counsel should not, of itself, be deemed sufficient, the discovery of new evidence subsequent to the decree, ought to be admitted, as a foundation for a rehearing. By this evidence it will appear, that other vessels, though really *British*, have been fitted out by the same parties, under the same cover; and, of consequence, the inference will be strong that the *Resolution* was also *British* property.

In opposition to the rule, it was observed, that the most pernicious consequences would ensue, if a new trial should be granted upon every request, and that the payment of costs will not be a sufficient check; as the advantage of having the property in hand more than compensates that inconvenience. But in answering the causes assigned for a rehearing, it was contended, that the Law of Chancery did not apply. In Chancery, the suits being new, and the parties liable to surprize, rehearings are frequently allowed; but in the House of Lords a rehearing is never allowed. Nor is it consonant with the practice of this Court; though if the Court was itself dissatisfied with the principles of the decree, that would undoubtedly be a satisfactory reason for the measure. Besides, on a rehearing in Chancery, no new evidence can be introduced; and the petition for a rehearing must state the reasons at large. 2. *Prac. Ch.* 450. *Ibid.* 10. But this application is in the nature of a Bill of review, and must, consequently, state new evidence. *Ibid.* 40. 452. 3 *Black. Com.* 451. 3 *Ath.* 35. 3 *P. Wm.* 371. 372. Nor is the new evidence, which is assigned as another cause for a rehearing, admissible: It respects another vessel; and the papers found on board the ship herself must be the ground of acquittal, or condemnation.

BY THE COURT:—As the original decree has not been carried into execution, we think it proper, under the peculiar circumstances of the present case, to allow a rehearing. But this is not to be drawn into precedent; nor is any point previously determined, to be brought again into litigation, unless the state of the facts respecting it shall be altered by the new evidence.

The causes were, accordingly, argued for several successive days; and on the 24*th of January* 1782, the following revisionary decree (altering

the suspended decree only as to a part of the cargo) was delivered by WILLIAM PACA, and CYRUS GRIFFIN, the presiding Commissioners.

p. 21 BY THE COURT. We have considered the new evidence | which has been laid before us, and we have also considered the observations and arguments, which the Counsel upon both sides have made upon it.

On the first argument we were of opinion, that the ship ought to be considered in the predicament of neutral property, and entitled to all the rights and privileges of neutrality, which the Ordinance of Congress ascertained and conferred; we took up this idea from a construction of the articles of capitulation and the *British* proclamation, which issued immediately on the rupture between *Great Britain* and the *States General*, and which protected the ship *Resolution* for a limited time from *British* capture on her passage from *Dominica* to *Amsterdam*: We conceived, that the neutrality of the *States General*, with regard to the ship, abstractedly considered, was not broken by the rupture; the proclamation having controuled the extent of the war, by its exemption of the ship from being a subject of hostility and capture

Such was our opinion on the first argument: But on consideration of the last argument, we are of a different opinion.

The writers upon the law of nations, speaking of the different kinds of war, distinguish them into perfect and imperfect: A perfect war is that which destroys the national peace and tranquillity, and lays the foundation of every possible act of hostility: The imperfect war is that which does not entirely destroy the public tranquillity, but interrupts it only in some particulars, as in the case of reprisals.

Before *Great Britain* commenced war with the *States General*, the *States* were a neutral nation with regard to the war between *Great Britain*, *France*, *Spain* and *America*: They had taken no part in the war, and were a common friend to all. This is precisely the legal idea of a neutral nation: It implies two nations at war, and a third in friendship with both. The war which *Great Britain* commenced with the *States General* was a perfect war: It destroyed the national peace of the *States General*, and with it the neutrality of the nation. The *States* became a party in the general war against *Britain*: They were no longer a common friend to the belligerent powers; and therefore they ceased to be a neutral nation.

War having thus destroyed the neutrality of the *States General*, they can never resume the character of a neutral until they are in circumstances to resume the character of a common friend to *Great Britain*, *France*, *Spain* and *America*: But this character is not to be acquired while war subsists between them and *Great Britain*. Only a peace, therefore, between *Britain* and the *States*, can put the *States* in a capacity to resume their original character of neutrality. But there can be no peace without the

concurrence of both nations: The *British* could not therefore, by | the p. 22
mere authority of their proclamation, restore back to the Ship *Resolution* her original neutrality. The Proclamation could only operate as a protection of the Ship from *British* capture.

We, therefore, lay out of question the ordinance of *Congress* with regard to the rights of neutrality; this case is not within it. But the Ship *Resolution* is captured and both Ship and Cargo are libelled as prize. A question is made; on whom lies the *onus probandi*? We think on the captors. There can be no condemnation without proof that the Ship or Cargo is prize; and it cannot be expected, that the persons who contest the capture will produce that proof.

Every capture is at the peril of the party. A privateer is not authorized to capture every vessel found on the high sea: She is commissioned to capture only such ships as are the property of the enemy. Every ship indeed may, in time of war, be brought to and examined; but she is not to be seized and captured, without the captors have just grounds to think she is the property of an enemy, and not the property of subjects of a nation in peace and friendship, or neutrality. If such seizure and capture are made without just grounds, the party injured is entitled to have an action for damages: And it is the policy of all nations at war to oblige the captains of privateers to give bond and security, to enforce a proper conduct while at sea, and to prevent seizures and captures from being wantonly made.

The sea is open to all nations: No nation has an exclusive property in the sea. Put the case then, that a privateer meets a ship at sea; is it to be inferred, from the mere circumstance of the ship's being found on the high seas, that she is the property of an enemy? Surely there is no ground for such an inference: On this ground a privateer might seize and capture the ships of its own nation. But the privateer attacks, seizes, captures and brings the ship into port: It is plain here is an act of violence; a seizure and capture. The captain therefore must do two things: At all events he must shew just grounds for the violence, or he will be punishable at law by an action of damages: and in the next place, before he can obtain condemnation, he must prove the ship to be the property of an enemy; for, it can never be enough for condemnation, that he found the ship at sea.

The captors say: 'That in the present case they had not only just grounds for seizure; but they have also just grounds for condemnation: For both the ship and cargo were found in the possession of *British* subjects, and therefore *British* property.'

It must be admitted that possession is presumptive evidence of property; because possession is a circumstance which generally accompanies property; and, therefore, the seizure and capture, in the present

p. 23 case, was a violence at all events justified by | the law of nations, and for which no action would lie, even on acquittal of the Ship and Cargo. But the possession in this case is no ground for condemnation : For what is the nature of presumptive evidence ? It only has the force of evidence whilst it remains uncontested. The possession is clearly accounted for : The ship came into the hands of the enemy by capture ; and the prior possession was in the hands of *Dutch* subjects, and not *British* subjects. The presumption therefore relied on by the captors is defeated and the argument founded on the possession is in favor of the claimants.

On the question of Prize or no Prize, what evidence does the law of nations admit for the determination of it ?

The national interest of every commercial country requires, that some mode or criterion be adopted to ascertain the ship, cargo, destination, property and nation to which such ship belongs ; not only as a security for a fair commerce according to law ; but as a guard against fraud and imposition in the payment and collection of duties, imposts and commercial revenues. The peace also and tranquillity of nations equally require, that the like criterion should be adopted, to distinguish the ships of different countries found on the high seas in time of war ; to prevent an indiscriminate exercise of acts of hostility, which may lay the foundation of general and universal war. Hence it is, that every commercial country has directed, by its laws, that its ships shall be furnished with a set of papers called Ship Papers : And this criterion the law of nations adopts, in time of war, to distinguish the property of different powers, when found at sea ; not indeed as conclusive, but presumptive evidence only. Bills of lading, letters of correspondence, and all other papers on board, which relate to the ship or cargo, are also considered as *primâ facie* evidence of the facts they speak ; because such papers naturally accompany such a mercantile transaction.

Such then is the evidence which the law of nations admits on a question of prize or no prize ; and it is on this evidence that vessels with their cargoes are generally acquitted or condemned : And therefore, if in this case the papers on board affirm the ship and cargo to be such property as is not prize, there must be an acquittal, unless the captors are able, by a contrariety of evidence, to defeat the presumption which arises from the papers, and can shew just grounds for condemnation. On the other hand, if the papers affirm the ship and cargo to be the property of an enemy, there must be a condemnation, unless they who contest the capture can produce clear and unquestionable evidence to prove the contrary.

The papers on board, the manifest, clearance, bills of lading, the depositions annexed, the certificates of the Chief Justice of *Dominica*,
p. 24 the *French* Governor's passport, and the letters of correspondence | from

the shippers, collectively taken, prove the Ship to be the property of *Brantlight & Son*, subjects of the *States General*, at the port of *Amsterdam*, and the cargo to be the property of *British* capitulants, residing or owning estates in the Island of *Dominica*, and entitled to the rights of commerce according to the capitulation on the conquest of that Island; except with regard to such parts of the cargo as were shipt by *Morson & Co.*, *Morson, Vance & Co.*, and *Lovel, Morson & Co.*

It lies then on the captors to obviate the force of this evidence: It must be obviated, or an acquittal must be decreed, to the full extent of the evidence.

The papers have been taken up by the Counsel for the captors and separately and distinctly considered, and it is said they do not prove the facts to which they are adduced. It is true, separately considered, they do not; but collectively taken, we think they do, except in the instances we have mentioned.

Many objections have been made to obviate the force of this presumptive evidence: The objections go to the competency of many of the papers, and to the credibility of all. 'The certificates of the Chief Justice, it is said, ought not to be admitted as legal and competent evidence; for the Chief Justice is a *British* Judge of the Island of *Dominica*, and an enemy.'

We do not think the Chief Justice on that Island, reduced as it is by conquest, can with propriety be called a *British* Judge and an enemy. But whether he derives his commission originally from the Crown, and still holds it under the articles of capitulation, and so far is a *British* Judge, or not, he must certainly be subject to removal by the *French* government; and it highly derogates from the honor and dignity of the *French* Crown, and too deeply affects the zeal and loyalty of Governor *Duchilot*, to admit the supposition, that a man is suffered to fill so important an office, who publicly prostitutes his official character from a partiality to the *British* nation.

The Chief Justice gave his certificates officially and under the obligation of an oath: We must want charity indeed, if, under these circumstances, we were to say, that they have not even the force of presumptive evidence.

But the competency of this evidence, so far as it is adduced to prove the owners or shippers of the cargo *British* capitulants, is objected to, on another ground. It is said; 'These certificates are not the best evidence the nature of the case will admit, and which the party has in his power to produce: An attested copy of the articles of capitulation, and the names subscribed, ought to have been produced.'

This principle of evidence applies forcibly against the captors, but does not affect the claimants. The articles of capitulation bind *Great Britain, France* and *America*. It is a solemn compact | or treaty. All p. 25

the parties to it, the citizens of each nation, are morally bound by it: And it is not only admitted, but contended for, by the counsel for the captors, that even neutral nations are under a moral obligation to regard it; and that it is upon this principle the law of nations takes cognizance of and determines upon it.

The papers on board shew a fair commerce, and affirm the cargo to be the property of capitulants, except in the instances mentioned. If they are not capitulants, and yet *British* subjects, they have violated the capitulation, engaged in a fraudulent and illicit commerce, and are chargeable with a breach of moral obligation. The claimants stand upon two grounds of presumption: first, the presumption which arises from the papers; and then the presumption that no man would do that which he is morally bound not to do. The claimants cannot be affected while these presumptions remain uncontested. How are they to be contested? By what evidence? Certainly the best evidence that the nature of the case will admit, and which the captors have in their power to produce. And if an attested copy of the articles, and of the names subscribed is the best evidence to prove who are capitulants, it is the best to prove who are not capitulants; and, therefore, the captors ought, on their own principles, to produce it; they having it as much in their power to produce such copy as the claimants.

But it is said, 'the ship's papers are defective; the register is not produced; it is withheld, and gives a ground of suspicion.'

We have no doubt, a register was on board at the time of the capture: But we do not think there is any ground for suspicion under the circumstances of the case.

The *Resolution* was captured by a *British* privateer. The *British* captain took possession of the ship's papers, and captain *Waterburgh*, the captain of the *Resolution*, was made prisoner. Afterwards the *Resolution* was captured by the *American* privateer, and the *American* captain took possession of such papers, as the *British* captain had suffered to remain on board the *Resolution*. Captain *Waterburgh* was not brought into port with his ship.

It was the interest of both the *British* and *American* captains to withhold the register, if it proved the ship to be the property of subjects of the *States General*; and neither the *British* captain nor the *American* captain have made oath, that the papers produced to the Court are all the papers, which were found on board, and came respectively to their hands and possession.

But it is said, 'no credit or faith is to be given to those papers, because
p. 26 replete with contradiction and absurdity. The | Manifest, it is said, contradicts the Bills of Lading: The Manifest purports the property of the cargo to be in the persons named therein as the shippers, and the

Bills of Lading shew, in many instances, that the property is in others.'

The Manifest exhibits a column under the description of shippers; and it also exhibits a column under the description of marks, and other columns for the cargo.

The Bills of Lading correspond with the column of marks; and the persons described as shippers in the Manifest, are ascertained by the Bills of Lading to be persons, who acted principally as attorneys, managers, or agents, for those who are mentioned in the Bills to own the property for which the Bills are taken; the property in the Bills being in the general produce of such owners' estates in *Dominica*. There is therefore no contradiction between the Manifest and Bills of Lading; for, the term shippers does not imply the property to be in such shippers; the term as properly applies to a factor, or attorney, or agent, as to the owner.

'But, it is said, Governor *Duchilot* was imposed upon; that he refers in his Passport and Certificate, which is endorsed on the Manifest, to the 17th article of the capitulation; that the 17th article speaks of such merchants as have goods or merchandize; and that therefore the Governor must have been informed that the shippers were the owners of the cargo.'

It is true the 17th article says, the merchants may sell their merchandize, and carry on their trade, and the term *their* implies the property to be in them: But the term *their* may also apply to the property which a factor, agent or attorney has the possession, management and shipment of, for others; for, although they have not the general, yet they have the special, property.

'But, it is said, the shippers dared not to avow the names of the persons mentioned in the Bills of Lading, from a consciousness that they were not capitulants, and that the Governor would have refused them a License, Passport and Certificate.'

If the shippers felt such a consciousness, why avow the names of such in the Bills of Lading? It was not only necessary to take measures to prevent discovery on the Island, but also to guard against detention on a capture at sea. Why was the Governor's Passport and Certificate obtained? Was it not to protect the ship and cargo from capture? But if the Manifest, Passport and Certificate had no reference to the Bills of Lading, but were contradictory and inconsistent, and the persons avowed by the Bills of Lading to be the owners of the property were not capitulants, is it not a novelty in the game of fraud, to furnish a ship with such papers as proclaimed a contradiction to the Manifest, | Passport p. 27
and Certificate, announced the criminality of the commerce, and exposed both ship and cargo to capture and confiscation?

Prudence required, and very probably it was enjoined by the Govern-

ment, that before a ship should be suffered to clear out, and proceed on her voyage, proof should be made and taken with her, not only that the shippers of the cargo were capitulants, but also, that the owners of the cargo were capitulants. It appears in this case, that above three fourths of this cargo, were shipped by agents, and attornies and factors. The Governor certifies the shippers to be capitulants. The chief Justice certifies the owners to be capitulants, and where his certificates are deficient, the depositions prove it. All this may be done, in conformity to the law, usage and practice of the Island.

But another contradiction is objected: It is said, 'the Bills of Lading contradict the other Papers, which import the property of the ship to be in *Brantlight & Son*; for the Bills consign the cargo to *Brantlight & Son*; and therefore it is contended the property of the ship could not be in *Brantlight & Son*; because it is observed to direct a man to pay freight to himself.' The Bills of Lading are not chargeable with any such absurdity. The freight is not directed to be paid to *Brantlight & Son*; the freight is to be paid to the captain; he is responsible for the wages of his crew, and other debts, contracted on account of the ship. Freight is answerable for all such claims, and the captain is entitled to receive it, to indemnify himself: He may, therefore, refuse to deliver the cargo, till the freight is paid. And by this means, in case of the bankruptcy of his owners, he is sure of an indemnification, to the extent of the freight.

But still another contradiction is objected: It is said, 'that both the Bills of Lading, and the oath of *Morson*, on the back of the Manifest, contradict the assertion of the other papers, that the ship is the property of *Brantlight & Son*: for, they prove the consignment of ship to *Brantlight & Son*; and therefore, it is contended, the property could not be in them, because it is absurd to consign a ship to the owners.' We do not see any such absurdity. Consignment is a mercantile phrase, adopted to distinguish the person, to whose care a ship is addressed, and, when applied to the owners, it is merely in conformity to forms. It is a common usage and practice of merchants to apply the phrase, indiscriminately, to owners, and others.

'But, it is said, the papers found on board the *Resolution*, do not sufficiently prove the ship to be the property of *Brantlight & Son*, when she arrived at *St. Eustatius*, from *Amsterdam*, early in 1780.' It is proved, by the oath of *Morson*, and captain *Waterburgh*, endorsed on the back of
p. 28 the Manifest, that this property | was subsisting, if not at the time of the deposition, yet, at least, on the arrival of the ship at *Dominica*, *October*, 1780. And *Morson & Company's* letter, to *Brantlight & Son*, dated 6*th March*, 1781, after the rupture with *Holland*, and shortly before the ship left *Dominica*, and which was found on board, proves the property to be then subsisting: for, in the close of the letter, they say, 'captain

Waterburgh nas drawn on you, in our favour, for disbursement, £191 : 15*s.*;' which disbursement plainly refers to disbursements of the ship, which *Brantlight & Son* could not be chargeable with, if they had parted with the property, and were no longer owners.

No evidence at all is produced to shew a change of property, or transfer of the ship. And, therefore, the fact being admitted, that she was the property of *Brantlight & Son*, on her arrival at *St. Eustatia*, in 1780, and the property being proved to be subsisting in *October*, 1780, and proved, to be subsisting in *March*, 1781, a few days before she sailed from *Dominica*, we cannot doubt, but that the property was subsisting, at the time of her capture. She was then no prize to the *British* privateer ; because protected by the *British* Proclamation : She was no prize to the *American* privateer ; because she was the property of the subjects of the *States General*, a nation in peace and friendship with *America*.

'But the papers, it is said, prove the cargo to be the property of persons, not capitulants : For *Morson & Company*, in their letter of the 6*th March*, 1781, speak of *Kender Mason*, as a shipper, who is not a capitulant.'

What does this letter say ? It is addressed to *Brantlight & Son*, and informs them, that the rupture with *Holland*, occasioned all shipments to stop ; that afterwards, the *British* Proclamation, protecting the *Holland* vessels from capture, for a limited time, on their passage back from *Dominica*, came to hand ; that even then, no one but *Kender Mason* and themselves would ship ; that, afterwards, shipment went generally on.

This letter proves clearly, that the cargo was shipped by many different persons. Not only *Kender Mason* shipped, but *Morson & Company* also shipped, and there were other shippers, who were alarmed, notwithstanding the *British* Proclamation, and would not immediately ship, though afterwards they proceeded to ship.

To what extent did *Kender Mason* ship ? *Morson & Co.'s* letter, which is the only evidence that he shipped at all, goes no further than to prove, that he shipt a part of the cargo. How shall this part be ascertained ?

The ship, it is admitted, by counsel on both sides, was consigned to *Morson & Co.* and *Alexander Henderson* ; and it appears from the papers on board, that upwards of two thirds of | the cargo were shipt by *Hender-* p. 29
son, as agent and attorney for the *British* capitulants ; the residue of the cargo was shipt, partly by *James Morson*, agent and attorney for *British* capitulants, partly by *Morson & Co.* and partly by others, in their own right, as agents and attornies for others.

The letter of correspondence, which *Henderson* addressed to *Brantlight & Son*, to whom the ship and cargo were consigned, and his letters of correspondence, addressed to the gentleman at London, for whom he was agent and attorney ; the bill of lading he took for the property shipt, and

his deposition annexed to the said bill, give a fair history of such part of the cargo, as was shipt by him : They prove it to be the property of *British* capitulants, and not the property of *Kender Mason.*

The depositions of *James Morson*, the bills of lading, and the certificates of the Chief Justice, point out and ascertain, what part of the cargo he shipt as agent and attorney, and prove it to be the property of *British* capitulants, and not the property of *Kender Mason.*

The depositions, bills of lading, manifest, letters of correspondence, the Governor's passport and certificate, and the deposition of *Morson* and *Fitzgerald* prove that the residue of the cargo, except what was shipt by *Morson & Co.*, *Morson, Vance & Co.*, and *Lovel, Morson & Co.* was the property of *British* capitulants, and not the property of *Kender Mason.*

If *Mason*, then, had any property on board, that property must have been in such parts of the cargo as were shipt by *Morson & Co.*, *Vance & Co.*, and *Lovel, Morson & Co.* With regard to this part of the cargo, the evidence is not full and compleat : For, altho' *Morson* is proved to be a capitulant, yet the company is neither ascertained, nor proved to consist of capitulants.

But it is contended, that the property shipt by *Henderson* was the property of *Kender Mason.*

On what ground is the idea taken up, that *Mason* had any property at all on board ? It is founded solely on that part of *Morson & Co.'s* letter, which mentions *Kender Mason* as a shipper. Exclusively of this letter, there is nothing, besides mere conjecture and possibility, to prove that he had any property at all on board.

This much must be clear ; that if *Henderson* was meant, then *Mason* was not meant.

Morson & Co. say in their letter, 'that even after the arrival of the *British* proclamation, no one but *Kender Mason*, and ourselves, would immediately ship.' If *Henderson* was not meant for *Kender Mason*, then *Henderson* was amongst those who were still alarmed, and would not immediately ship, on the arrival of the *British* proclamation ; and, consequently, *Kender Mason* could have no property in what was shipt
p. 30 by *Henderson*: | for it is absurd to say, that *Kender Mason* proceeded to ship, and *Henderson* did not, if what *Henderson* shipt was the property of *Kender Mason.*

But, it is objected, 'that altho' *Kender Mason* is mentioned in the letter, as a shipper, yet it is to be understood, that he is there described as principal to *Henderson*, and therefore, what was shipt by *Henderson*, may with propriety be said to have been shipped by *Kender Mason.*'

What evidence is there of such a connection between *Mason* and *Henderson ? Mason's* letters of correspondence are all addressed to *Morson*, and the ship is consigned to *Morson* and *Henderson*, as persons

in separate and distinct interests. The idea too, of such a connection, is contradicted by the whole tenor of the papers found on board.

If *Henderson* was the agent or attorney for *Kender Mason*; if he was the person, with whom *Mason* was so extensively interested, in his commercial connections, then the idea of his connection with *Morson & Co.*, *Morson, Vance & Co.*, and *Lovel, Morson & Co.*, ought to be abandoned: for, it is not to be believed, that *Mason* should engage in three partnerships, and yet employ an agent or attorney, who ships forty times the quantity of produce shipt by all the three partnerships.

But it is contended, 'that both ship and cargo are the property of *Morson* and *Mason*, in consequence of a plan concerted at *London*, between *Kender Mason* and *Heshuysen*, agent for *Brantlight & Son*, while the ship *Resolution* lay at *Eustatius*.'

We have no doubt the voyage of the *Resolution* was planned at *London*, by *Kender Mason* and *Heshuysen*; but the plan must have been very different from the one suggested.

One of two propositions must be true; either *Morson* and *Mason* did not purchase the ship, and ship the cargo, in consequence of the plan suggested, or *Morson* has sworn falsely, and committed a perjury.

Morson, the 7th *March*, 1781, near twelve months after the *Resolution's* voyage was concerted at *London*, swears that the Ship *Resolution*, belonging to the port of *Rousseau*, and owned by *Brantlight & Son*, arrived at *Dominica*, *Oct.* 1780; for the purpose of taking on board a cargo of sugar and coffee, the property of capitulants.

This oath flatly contradicts the assertion, that the Ship was purchased; it also directly contradicts the assertion, that the plan was to ship a cargo, the property of *Kender Mason*; for *Kender Mason* is not a capitulant.

Morson's knowledge was competent to the facts he swore: He precisely knew what the plan was that was really concerted at *London*; for, it is strenuously contended by the counsel for the captors, that *Kender Mason*, in his letter to *Morson & Heshuysen*, | enclosed to *Waterburgh*, contained a full communication of it. p. 31

'But the papers, it is said, found on board the *Eustin*, throw great light upon the subject; they pluck off the mask, and exhibit *Mason* in his proper colours; they prove, that an illicit commerce has taken place, and that the articles of capitulation have been repeatedly violated.'

Admit, for argument sake, the fact, that the *Eustin* was engaged in an illicit commerce, how can the conduct of the *Eustin* affect the *Resolution?*

But what is this illicit commerce, which is charged to have taken place? Let it be ascertained, and we shall find, it cannot possibly apply to the *Resolution*.

'*British* goods, it is said, have been shipt from *London*, to *Dominica*,

thro' the intervention of neutral ports.' Can this species of illicit commerce apply to the *Resolution*? It is impossible; for she was never engaged in this *Dominica* trade, till after her arrival at *Eustatia*, early in 1780; and from thence she sailed to *Dominica*, where she lay, till the rupture between *Great Britain* and *Holland* took place; nor were *Brantlight* and *Son* ever engaged in such a commerce, for *Morson* and *Co.'s* letter, of the 6th March 1781, after the rupture, speaks of this house, as a new house, with which the people of *Dominica* were unacquainted; and mentions the difficulties he had, from that circumstance, to procure consignments.

'But the papers, it is said, of the *Eustin* prove that the produce of *Dominica* has been exported to *London*, through the intervention of neutral ports.'

Was the *Resolution* ever engaged in this species of illicit commerce? The peculiar circumstances of her case shew, that she never was. The rupture with *Holland* took place while she lay at *Dominica*; it stopped all shipments. On the arrival of the British proclamation, protecting *Holland* vessels, for a limited time, on their passage back, shipments went on; but the protection, which the proclamation gave, ceased on the arrival of *Holland* vessels back to their ports in *Holland*.

What ground then is there to think, that the *Resolution*, with her cargo, were destined, after her arrival at *Amsterdam*, to proceed to *London*, where both ship and cargo, would have been liable, after her departure from *Amsterdam*, not only to *British* capture; but, as contended by the counsel for the captors, liable also to *Dutch* capture, war prohibiting all commerce between the belligerent powers; and not only liable to *British* and *Dutch* capture; but, as the law of nations has been stated by the counsel of the captors, liable also to *French*, *Spanish* and *American* capture?

'But the papers, it is said, of the *Eustin*, prove that *Morson* and *Mason*,
p. 32 who planned the voyage of the *Resolution*, | also planned the voyage of the *Eustin*; and therefore, if the *Eustin* was engaged in an illicit commerce, the presumption is, that the *Resolution* was also employed in such commerce.'

We have already observed, that the *Resolution* could not possibly be engaged in the illicit commerce, with which the *Eustin* is charged; but if *Morson* and *Mason* planned both voyages, *Morson* knew the plan on which the *Resolution* was chartered, and he has proved it, on oath, to be a fair one, and in perfect conformity to the articles of capitulation.

'But *Mason*, in his letter from *Ostend*, August 1781, found on board the *Eustin*, writes to *Moreson*, that he has nearly accomplished the plan, which he informed him of in his letter dated October 1780, from Rotterdam, and it is contended, that this letter proves, that a plan is established at

Ostend, to centre there the whole *Dominica* trade, and to furnish *British* goods for *Dominica*, through that channel.' Admit the facts to be so; how does it affect the *Resolution* and her cargo? The rupture with *Holland* had taken place, and the *Resolution* was captured, and brought into port, several months before the plan was accomplished at *Ostend* and, consequently, whatever illicit practice that plan points at, cannot apply to the *Resolution*. But it is said, that the plan established at *Ostend*, was the plan, which was concerted at *London*, and established at *Amsterdam*, and *Rotterdam*, and shifted from those cities to *Ostend*, on account of the rupture with *Holland*. If the plan, now established at *Ostend*, is nothing more than the plan adopted at *London*, with regard to the *Resolution*, then it is a fair one; for *Morson* has told us, what the plan was, and he has declared it on oath. But we are of opinion, that the system now established at *Ostend* is a new one, and that it is not a former plan, shifted from *Holland* to *Ostend*, on account of the rupture. It originated indeed before the rupture, and might have taken place in *Holland*, had it been completed before that event. It is of such a nature as requires *Morson* to take his residence at *Ostend*. It occasioned a change, in his commercial connection at *London*, and a dissolution of the partnership, in which he was there engaged. The cargoes shipped from *Dominica*, tho' consigned to *Liber, Baas, Derd & Co.* were nevertheless to be disposed of, under his superintendancy. It was upon this plan, whatever it was, that the *Eustin* sailed; she may be affected by it, but the *Resolution* never can. We have said, the whole cargo of the *Resolution* is disproved to be the property of *Mason*; except such parts of it as were shipt by *Morson & Co.* and therefore if *Mason* had any property at all on board, it must be in such part of the cargo. |

We feel the force of the reasoning which has been employed to shew, p. 33
that the name of *Kender Mason* was inserted by mistake; but, as *Mason*, who appears to us to be a partner in three partnerships, and to have been the active person in shipping this part of the cargo, has acknowledged, for himself and company, that *Kender Mason* was a shipper, and the evidence, upon a careful review of it, leaves an opening to apply that acknowledgment to a concern in the three partnerships, we are led to change the opinion we had entertained on the first argument, with regard to this point, and now think, that this part of the cargo must be condemned as prize; and, not only *Mason's* proportion of it, but also the whole interest of the three partnerships: For, the shipping of produce by *Mason*, who is not a capitulant, is a violation of the capitulation; and as the three partnerships were consenting to it, and neglected their interest with *Mason*, they are *participes criminis*, and must equally

suffer. So far we have thought proper to animadvert on the new evidence, and the argument and observations of the counsel upon it. And, altho' on a decree of acquittal, almost the whole cargo will go into the hands of those who are not the friends of *America*, notwithstanding they have stipulated a neutrality during the war; yet, as they are entitled to it, by the articles of capitulation which bind *America*, the law of nations operating on those articles as a solemn compact, commands that such a decree must be given. We hope we feel just impressions of the wrongs and cruelties of *Great Britain*; but public faith must be maintained; the honor and dignity of the *United States* preserved, and the law of nations dispassionately and righteously administered.

We therefore adjudge and decree, that the order of this court, suspending the original decree, be discharged, and the said original decree, be affirmed in all its parts, except with regard to such parts of the cargo, as were shipt by *Morson & Co.*, *Morson, Vance & Co.*, and *Lovell, Morson & Co.*, which parts of the cargo we do adjudge and decree to be condemned, for the use of the captors, chargeable, nevertheless, with the stipulated freight.

Darby et al. Appellants, v. The Brig Erstern et al.

(2 Dallas, 34) 1782.

THIS was an appeal from the Admiralty of the State of *Massachusetts-bay*, where the Brig and her cargo had been acquitted. The case was argued on the 28th, 29th and 30th of *January*; and, on the 5th *February* 1782, the definitive sentence of the court was pronounced by PACA and GRIFFIN, the presiding commissioners, in the following terms:

BY THE COURT.—Upon the evidence in this case, we are of opinion, that the Brig, at the time of her capture, was the property of *Imperial* subjects at *Ostend*, and that the cargo was *British* property, unprotected by the capitulation of *Dominica*.

It is objected, 'The Brig is not prize, because neutral property.'

Neutral property cannot be captured: For, while the character of neutrality is preserved, such property is the property of a friend, on which the rights of war cannot attach; but the owners of a ship may violate their neutrality, by taking a decided part with the enemy: In what light is such a ship then to be considered, and what is to be done with her? The law of nations says, that a ship under those circumstances, is in the predicament of enemy's property, and subject to seizure and confiscation.

But it is said, 'the ordinance of Congress ascertains in what cases

the rights of neutrality are forfeited ; that the present case is not comprehended ; and therefore, if not protected by the law of nations yet it is protected by the ordinance of Congress.'

We are of opinion, that Congress did not mean, by their ordinance, to ascertain in what cases the rights of neutrality should be forfeited, in exclusion of all other cases ; for, the instances not mentioned are as flagrant as the cases particularized. The ordinance does not specify the case of a neutral vessel employed in carrying provision to a place which is besieged, and in want of bread : For, altho' one of the articles says, ' You shall permit all neutral vessels freely to navigate on the high seas, or the coasts of *America*, except such as are employed in carrying contraband goods, or soldiers, to the enemy ; ' yet another article says, that the term *contraband* shall be confined to the articles there enumerated, and provision is omitted. Were | Congress asked, whether they meant p. 35
to protect from capture, a neutral ship loaded with provision, and destined for *York* and *Gloucester*, when besieged by the armies of the *United States* and *France*, no one could possibly doubt what their answer would be. The plain and obvious construction of the ordinance is, that while neutral vessels observe the rights of neutrality, they shall not be interrupted by *American* captures : Congress meant to pay a regard to the *rights*, and not to the violations of neutrality.

But, it is objected, ' that in this case, if the Brig has violated the rights of neutrality, it is because she intended a violation of the capitulation of *Dominica* ; that the capitulation of *Dominica* can only be considered as a local law, of which there can be no breach, until the offending ship comes within the civil jurisdiction of the island ; that the Brig was captured before the arrival within the jurisdiction of *Dominica* ; and that therefore she was captured, before there was any violation of the rights of neutrality.'

If nothing could be objected against the Brig, but an intentional violation of the capitulation, abstractedly from the consequences, with regard to the war between *Great Britain*, *France*, and the *United States*, possibly such reasoning might be conclusive : But we are of opinion, that the Brig has done more than a mere intentional offence, with regard to the capitulation.

The subjects of a neutral nation, cannot consistently with neutrality, combine with *British* subjects, to wrest out of the hands of the *United States* and of *France*, the advantages they have acquired over *Great Britain* by the rights of war ; for, this would be taking a decided part with the enemy.

On the conquest of *Dominica* a capitulation took place, and by that capitulation, a commercial intercourse between *Great Britain* and that Island was prohibited : The object was to weaken the power of *Great*

Britain, by lessening her naval and commercial resources. But what has been the conduct of the Brig and the *Imperial* subjects her owners? *Kender Mason*, a *British* subject, establishes a plant at *Ostend*, by which the commerce of *Great Britain* with *Dominica* is to be kept up and preserved, thro' the intervention of that port. On this plan *Liebert, Beas, Dardine & Co. Imperial* subjects, purchase at *London* the Brig *Erstern*: *Kender Mason* puts on board a cargo of *British* merchandize, the property of *British* subjects: The Brig clears out from *London*, ostensibly for *Ostend*, and there arrives: *Liebert, Beas, Dardine & Co.* supply her with false and colourable papers, assume upon themselves the ownership of the cargo, and dress it up in the garb of neutrality, to screen it from detention and capture: The Brig then clears out for *Dominica*, and sails for that Island with the cargo she took on board at *London*. |

p. 36 Can such conduct consist with neutrality? Can there be a more flagrant violation of it? Does it not aim to wrest, from *France* and the *United States*, the advantages they acquired by the conquest of *Dominica*: And does it not evince a fraudulent combination with *British* subjects, and a palpable partiality?

But, 'why shall the rights of neutrality be broke by works of supererogation? If the cargo was *British* property, unprotected by the capitulation, it was then the property of enemies, and as it did not consist of contraband articles, it was protected from capture, by the ordinance of Congress: The Brig, therefore, needed not to employ fraud and stratagem to give it the garb of neutrality, in order to screen it from capture.'

If the offence, which the Brig has committed, consisted in employing fraud and stratagem, merely to protect property which belonged to an enemy, the objection might, in consequence of the ordinance of Congress, be of some force. But the offence is not of so limited a nature; it is far more extensive, and comprehends a flagrant violation of the rights of neutrality: It results from a fraudulent combination with *British* subjects, to give weight and energy to the arms of *Great Britain*, by the re-establishment of a commerce, and its emoluments, which she had lost by the conquest of *Dominica*.

But, it is objected, 'The cargo is not prize, because it is not contraband, and all the other effects and goods, tho' the property of an enemy, are exempted from capture by the ordinance of Congress.'

If the *Erstern* had been employed in a fair commerce, such as was consistent with the rights of neutrality, her cargo, tho' the property of an enemy, could not be prize; because Congress have said, by their ordinance, that the *rights of neutrality* shall extend protection to such effects and goods of an enemy. But, if the rights of neutrality are violated, Congress have not said, that such a *violated neutrality* shall give such

protection: Nor could they have said so, without confounding all the distinctions between right and wrong.

Upon the whole, we are of opinion, that the decree below be reversed, and that the said Brig and Cargo be condemned, as prize, for the use of the captors, without costs.

Keane et al., Libellants and Appellants, v. The Brig Gloucester et al., Appellees.

(2 Dallas 36) 1782.

THIS was an appeal from the Admiralty of *Pennsylvania*, and after argument, PACA and GRIFFIN, the presiding Commissioners, delivered the following sentence.

BY THE COURT :—Two objections are made to the decree below : p. 37

The first objection is, that a libel does not lie by the crew of a privateer, for their respective proportions of a prize.

The second objection is, that the libellants, in this case, are not part of the privateer's crew, nor captors, entitled to a proportion of the prize stated in their libel.

With regard to the first objection, we are of opinion, that a libel does lie, and that it is the proper and regular mode of redress : For, the commission of a privateer, according to the form established by Congress, extends not only to the captain, but also to the ship and crew ; they are captors, as well as the captain, and their rights to the thing captured, is equally founded on the commission. The Ship is figuratively considered as an agent, and represents the owners. Articles of agreement generally direct the distribution ; but if no articles are executed, the Admiralty Courts will make distribution, in proportion to the number, interest and merits of the captors.

But, it is said, ' the Admiralty Court, in this case, had exercised all its jurisdiction and power ; that a libel was filed by the captain, and a decree passed for condemnation ; that the prize has been sold, and the money lodged in the hands of the Marshal ; that the Marshal must make distribution according to the list of the crew, which the captain shall deliver ; and if the captain makes a false list, the party injured has no other remedy than by an action at law.'

The original libel, we find, was filed by the captain, in behalf of himself and crew, and the decree adjudges the prize to the captors. The Marshal has sold the prize, and the money lies in his hands ; on application, he refuses to pay the libellants ; and the question is, what is the mode of redress ?

We are of opinion that the libellants had a double remedy: They had an action at law, for money had and received to their use; and they were entitled to a supplemental libel, upon which a decree and order might have been obtained, to compel the Marshal to pay the money. Such a libel is nothing more than a form of proceeding, to carry into execution the original decree; and if the Admiralty Courts are competent to give judgment, they must be competent to carry it into execution.

We are also of opinion, that if a Marshal makes distribution, without the orders of the Admiralty Court, he does it at his peril. The list or return of the crew by the captain, is no justification for his payments. He is the officer to carry the decree of the Court into execution, and he must take care that his payments are made according to such decrees; for, on misapplication of the payment, a libel will lie to make him responsible. If he would therefore act safely, he ought, before he makes | his p. 38
payments, to obtain the order and direction of the Court; and the Admiralty Courts ought not to make an order, without previous measures to guard against fraud and imposition, by providing for latent claims.

But on the second ground, it is said, the decree below ought to be reversed; which is, that the libellants are not part of the privateer's crew, nor captors, entitled to the prize stated in their libel.

It is proved, and admitted on all hands, that the libellants were shipt on board the privateer, at Philadelphia; that they were shipt under the articles of agreement, and shipt and received on board, as part of the privateer's crew; that, as part of the privateer's crew, they navigated the privateer down to Chester; that there the captain, without any objection to their skill or ability, ordered them on shore, and obliged them to abandon the privateer, and left them; and that afterwards he, and all the residue of the crew, destroyed the original articles of agreement, and executed a fresh set.

Under the circumstances stated and admitted, we are of opinion, that the libellants are entitled to a full proportion of all prizes which were captured during the cruise, for which the libellants were engaged, and from which they were forcibly excluded.

We have already observed, that the right of the crew to captures is not founded on the articles of agreement; but on the privateer's commission. When the libellants were shipt at Philadelphia, and received on board by the captain as part of the crew, the right under the commission attached. This right they derived from an authority, paramount to the captain, and therefore the captain could not arbitrarily deprive them of it.

But it is said, the captain, only, did the wrong; and therefore he alone should be responsible for it, and not the residue of the crew.

The libellants do not seek a compensation for a *wrong*; they are not in pursuit of damages for a *tort*. When they were shipt and received

on board at Philadelphia, they then became part of the crew, and the right to capture and make prizes was a right they held jointly with the ship and officers, and residue of the crew. The articles of agreement directed the distribution, and ascertained the share; and the libel is for shares, according to the articles. The demand, therefore, which the libellants make, does not lessen the shares of the residue of the crew, nor call on them for a compensation: It is a demand, which the residue of the crew acknowledged, and agreed to, when they executed the articles.

But it is said, on the dismission of the libellants, their proportion of the risk and labour fell on the residue of the crew; and, therefore, they ought to have an additional compensation beyond the articles of agreement. p. 39

Whatever compensation, they may, in justice, be entitled to, they cannot dispense with, nor derive it from the articles of agreement. The articles make no provision for such events, and no man, on board, can claim beyond the extent of the articles. On this ground it is, that although a Mariner, who is once shipt on board, and is dismissed by the Captain, without fault, before the voyage is ended, is entitled to his stipulated wages, for the whole voyage; yet the residue of the Crew can only claim to the extent of their contract; although, by the dismission of such Mariner, the risk and labour becomes proportionally greater.

But, it is said, that after the dismission of the libellants, new articles were executed by the Captain, and residue of the Crew; by which their shares of prizes were augmented, in proportion to the lessening of the crew, by the libellants' dismission; and, that the libellants' claim affects their right, under the subsequent articles.

The Captain and the residue of the Crew could not cancel the original articles of agreement. When a contract is made, it can only be dissolved by the consent of all parties. The after articles, therefore, cannot affect the original articles, nor authorize a departure from them.

These articles, instead of militating against the libellants' claim, tend to establish it on another ground: For, they shew that the residue of the Crew approved of the dismission, and therefore ought to be considered as *participes criminis*, and equally responsible with the Captain.

But, it is said, 'that the libellants did not, by any personal service, contribute to the capture in the present case; that the prize was taken by the ship, the Captain and Officers, and residue of the Crew; and, that although the libellants had a right under the commission to make captures, yet the right was not exercised in the capture of the prize in question.'

The ship, Captain, Officers and Crew, were joint-tenants of the right to capture and make prizes conceded by the commission. Whatever was acquired in consequence of this joint right and interest must be considered as common stock, and like the case of a joint partnership, not subject

to survivorship. Where the right and interest is a joint concern, the question never can be material, which of the parties have been most active and alert: The only question that can arise must be; whether the joint concern and interest is fairly subsisting?

Upon the whole, we are of opinion, that the decree below be affirmed, with costs to the libellants.

Stoddard, Appellant, v. Read, Appellee, and the Schooner Squirrel and Cargo.

(2 Dallas 40) 1783.

On motion of the Appellant's Counsel, before an appearance filed on behalf of the Appellee, stating that the prize Schooner was in a perishing condition, it was ordered,

By the Court. That the Schooner, her tackle, apparel, and furniture, be sold at public auction, to the highest bidder, for the use of those to whom the same shall be finally decreed.

Bain et al., Appellants, v. Schooner Speedwell et al., Appellees.

(2 Dallas 40) 1784.

This was an appeal from the Admiralty of the State of *Rhode-Island*, where the Schooner had been condemned as prize; and the record was submitted to the decision of the Court, without argument. On the 24*th* of *May*, 1784, Griffin, Read, and Lowell, the presiding Commissioners, delivered the following judgment:

By the Court. It appearing, by the inspection of the record, that the Schooner in question, was captured from the *British*, since the operation of *the preliminary* articles of peace, (to wit, on the day of) the condemnation cannot be sustained.

Decree reversed.

Lake, &c., v. Hulbert et al.

(2 Dallas 41) 1787.

This case now came before the Court, on a petition, that the appeal should be sustained: but Griffin, Read, and Lowell, Commissioners, rejected the application in the following terms.

By the Court. In this case, the judgment of the Court will be determined by the construction of the resolution of *Congress*, of *June*, 1786.

Congress having established a system of appeals, and in that system having limited a period, beyond which appeals are not to be entered, we think the resolution of *June*, 1786, could only mean, that, in conformity with this prior establishment, the judges might use a discretionary power, where particular circumstances, consistent with justice and right, may in their opinion require it.

Whatever decree the Court might have made upon the merits of the cause, and although the property may have been illegally condemned in the maritime Courts; yet under all the circumstances of the present case, we are unanimously of opinion, that justice and right do not require, that the appeal should now be sustained.

Petition dismissed.

The Owners of the Sloop Chester v. The Owners of the Brig Experiment et al.

(2 Dallas 41) 1787.

A PETITION for sustaining an appeal, with testimony in support of the allegations contained in the petition, being filed, a rule was granted to shew cause, why the appeal should not be sustained. The case was argued, on the 1*st* of *May*, and on the 3*d* of *May*, GRIFFIN, READ and LOWELL, the presiding Commissioners, delivered the decision of the Court:

BY THE COURT. Having considered the evidence, and arguments adduced by the Counsel for the petitioners, and respondents, we are of opinion, that there is not sufficient cause to admit the appeal of the petitioners, from the decree of the Court of Admiralty, in the State of *South Carolina*, condemning the Sloop *Chester*, her Apparel, and Cargo. If the appeal | should be admitted, it must be on this principle, that p. 42
there had been such irregularities in the proceedings, as that justice and right required, that the cause should be re-heard, in order to do that justice here, which had not been done in the Court below. The irregularity suggested is, that the captors did not bring, or send, the master of the captured vessel, in order to be enquired of touching the property, &c. nor produce the documents mentioned by the master, in his protest; and that, for want thereof, a condemnation had taken place. However blamable the captor may have been, in omitting to send, or bring the master before the Admiralty Court, and in not producing those documents, such omission alone is not sufficient to set aside the decree and re-hear the cause, unless it appeared that substantial justice has been thereby prevented. In this case, upon an examination of all the evidence produced, it appears that the condemnation of the Sloop *Chester* must have taken place, if the same evidence had been offered in the Admiralty Court.

Peter Theodore Vantylengen appears to have been a merchant in a *British* settlement, on the *Bay* of *Honduras*; not barely having a transient residence, but carrying on trade from that settlement, like other inhabitants. It is not material to whom his natural allegiance was due; he was enjoying the privileges, and subject to the inconveniences of other merchants, residing in the same place. The Sloop *Chester* appears to have been a *British* vessel, possessed of *British* papers, purchased by *Vantylengen*, and employed by him; and although he might have executed the Bill of Sale of her, to certain subjects of the *United Netherlands*, with whom the *United States* were at peace and amity, for the purpose, as he expresses it, of preventing her being taken, such a transfer cannot be considered as *bona fide*; but, from the tenor of the instructions of said *Vantylengen*, to the master of the Sloop, that transfer appears to have been intended merely to deceive and cover, under the name of a friend, property which ought to be considered as that of an enemy. Examining the protest made by the master of the Sloop *Chester*, it does not appear, that he was prevented by the captors from going to *Charleston*; but on the contrary, his going on shore at *St. Eustatia*, upon the privateer's leaving that place, seems to have been in consequence of his own solicitation. For these reasons, the Court do not admit the appeal of the petitioners. And, it is considered by the Court, that the petition be dismissed; but as some irregularities, on the part of the captors, have given colour to the petition, the Court do not award costs to the respondents.

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